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Brief of Plaintiff in Error

Brf. of Jones & James for P. E.

THIRD ORAL ARGUMENT.

Filed Oct. 13, 1898.

THE UNITED STATES OF AMERICA.

In the Supreme Court of the United States.

OCTOBER TERM, 1898,

No. 15.

October Term, 1897,
No. 194.

October Term, 1896,
No. 551.

HERMAN KECK, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

RANKIN DILWORTH JONES,
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(16,330)

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EPITOME OF BRIEF.

I.—Smuggling Defined.

(1.) Revised Statutes (2d Ed.), Section 2865, punishing smuggling is Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565).—*Post* p. 5; pp. 6–8.

(2.) It is a first rule in the interpretation of statutes to determine what a legislative body means by what it has said.—*Post* p. 5; pp. 8–9.

(3.) The words of a statute must be understood in the sense which they bore at the time it was adopted.—*Post* p. 5; p. 9.

(4.) Where a word having a well-defined legal meaning at the time of the adoption of a statute is incorporated into a statute it must be given that meaning.—*Post* p. 5; p. 9.

(5.) Where a word having a well-defined meaning at common law at the time of the adoption of a statute is incorporated into a statute it must be given that meaning.—*Post* p. 5; pp. 12–15.

(6.) On the authority of Hawkins, Russell, Gabbet, and Bacon, August 30, 1842, smuggling meant "the bringing on shore or carrying from shore goods and merchandise for which the duty has not been paid or goods of which the importation or exportation is prohibited." When Congress, August 30, 1842, Section 19 (5 Stat., 548, 565), prescribed a punishment for smuggling, the word smuggling should be given its accepted meaning at that date.—*Post* p. 5; pp. 9–12.

II.—Rulings of Court Assigned for Error as to Smuggling thus Defined.

(1.) Criminal statutes are to be strictly construed, and cannot be extended by construction to cover cases not falling within their

terms. There are no constructive crimes. When Congress has not made an act punishable, a court cannot enlarge a statute. An act not within the language of a statute is not within the statute because it is of equal atrocity or of a kindred character with those acts which are enumerated. To say that a case is within a criminal statute because within its reason, is to legislate and not to interpret legislation. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, will justify any judicial addition to the language of a statute. A court, in interpreting a statute, cannot hold that Congress must have intended to do that which it has failed to do. Congress is presumed to know the meaning of words, and words are to receive their plain and literal meaning even though the intention of Congress may have been different from that expressed.—*Post* p. 15; pp. 21–25.

(2.) Obtaining diamonds in Europe with the intention of smuggling into America, omitting to get a consular invoice, placing them in a state-room on a steamship at Liverpool, omitting them from the steamship's manifest, steaming the ship into the high seas, steaming the ship into the port of Philadelphia, accompanied with an intention to smuggle, and not taking the diamonds on shore, while such acts may constitute the distinct offenses of omitting from the manifest, or importing contrary to law, or failing to produce the manifest, they do not constitute the crime of smuggling within the meaning of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.).—*Post* p. 16; pp. 25–28.

III.—The Definition in the Anti-moiety Act Does Not Apply.

(1.) What Congress means is to be determined by what Congress says. Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), defines smuggling "for the purposes of this act." Congress having thus given a definition of smuggling "for the purposes of this act," that definition can not be extended by implication or construction to another act. The same word used in several acts of Congress may have a different meaning in each act. Where Congress has defined a word "for the purposes of this act," courts are not at liberty to strike out these words or add the interpreting clause to another statute. The words are sensible, and have a decided influence on the meaning

of the act in which they are used, and to strike them out, or to ignore the words, "for the purposes of this act," and arbitrarily add this special interpreting clause of one act to another act is making very free with legislative language, and amounts to judicial legislation.—*Post*, p. 28; pp. 29–37.

(2.) The definition of the word smuggle, "for the purposes of this act," contained in the proviso to Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), can not be given the word smuggle in Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.).—*Post* p. 28; pp. 29–37.

IV.—Rulings of Court Assigned for Error as to Smuggling Defined in the Anti-moiety Act.

(1.) If, contrary to our contention, the Court adopt the definition contained in the Anti-moiety Act, then the following eight (8) elements must co-exist to constitute a violation of Section 19 of the Act of August 30, 1842 (5 Stat. 548, 565), now Sec. 2865, Rev. Stat., to wit: (*a*) An *act* of getting goods into the United States without passing them through the custom-house; *or* an *act* of getting goods into the United States without submitting them to the officers of the revenue for examination; (*b*) goods, wares, or merchandise; (*c*) which should have been invoiced; (*d*) and as to which the invoice is omitted; (*e*) goods, etc., subject to duty; (*f*) the duty not being paid; (*g*) done knowingly and willfully, and (*h*) all with intent to defraud the revenue of the United States. No obligation arises to pay duty until after the vessel has come into port with intent to land. The *act*, therefore, necessarily refers to an *overt act* after an obligation has arisen to pay duty.—*Post* p. 37; pp. 42–48.

(2.) Obtaining diamonds in Europe with the intention of getting them into America without passing them through the custom-house, and without submitting them to an officer of the revenue for examination, placing them in a state-room on a steamship at Liverpool, omitting them from the steamship's manifest, steaming the ship into the high seas, steaming the ship into the port of Philadelphia with intent to land them, accompanied with an intention not to pass them through the custom-house and not to submit them to an officer of the revenue for examination, and a demand for the diamonds by a revenue

officer who did not make himself known as such, a refusal to deliver them to the revenue officer without an order, a failure to produce an order, and only delivering them to the revenue officer after the revenue officer had made himself known and had been identified as such, and then delivering them to him in his official capacity, does not constitute an *act* of getting the diamonds into the United States without passing them through the custom-house, or submitting them to an officer of the revenue for examination. A demand by a revenue officer, as such, for said diamonds, and a delivery thereof to him as such, do not constitute an *act* of getting diamonds into the United States without passing them through the custom-house or submitting them to an officer of the revenue for examination.—*Post* p. 38; pp. 48–51.

(3.) The Act of June 1, 1872 (17 Stat., 196, 198), now Sec. 1035, Rev. Stat., only permits a verdict of guilty of an attempt when the attempt is itself a separate offense. The statutes of the United States have never made an attempt to smuggle a separate offense.—*Post*, p. 38; pp. 51–52.

(4.) The interpreting clause contained in the proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), makes smuggling for the purposes of that act either (*a*) an act of smuggling actually completed, or (*b*) an overt act of an attempt to smuggle. This gives the word smuggle an unnatural meaning not in accordance with the common understanding of the word and contrary to the rules of grammar. The interpreting clause furnishes a rule for the interpretation of this statute, but not for the interpretation of the indictment. It, therefore, follows that an indictment for smuggling is not an indictment for attempt to smuggle, and an attempt to smuggle not being made a separate offense, there could be no conviction for an attempt to smuggle under said indictment.—*Post* pp. 38–39; pp. 52–54.

(5.) An attempt is an overt act of the same character as an act which would constitute a completed offense if not interrupted before its completion. An intent is not an overt act of attempt, and overt acts of preparation with intent do not constitute overt acts of attempt.—*Post* p. 39; 59–62.

(6.) The facts set forth in paragraph (2), above, do not constitute more than overt acts of preparation with an intent, and do not constitute overt acts of an attempt to smuggle.—*Post* p. 39; pp. 54–67.

V.—Smuggling is Not Importing Contrary to Law.

(1.) In interpreting the statutes of a government, full force and effect shall be given to each section of said statutes. In order so to do, courts will so construe one section as not to defeat, annul, or destroy another, but to explain and support it.—*Post* p. 68; pp. 68–70.

(2.) Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., punishes smuggling, and is necessarily confined to overt acts done after an obligation has arisen to pay duty, and, therefore, after the importation is complete. Section 4 of the Act of July 14, 1866 (14 Stat., 178, 179), now Sec. 3082, Rev. Stat., by its terms punishes importing contrary to law. It, therefore, pertains to unlawfulness in matters pertaining to the port, and not to overt acts after the importation is complete.—*Post* p. 68; pp. 68–72.

(3.) Therefore, smuggling is not importing contrary to law, but an offense distinct therefrom, and which can only arise after the importation is complete.—*Post* p. 68; pp. 68–72.

VI.—The Crime of Smuggling was Not Committed, Because the Law did Not Require an Invoice.

(1.) The offense of smuggling under Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., can only exist as to goods which the law requires to be invoiced.—*Post* p. 72; p. 73.

(2.) Sec. 4 of the Act of June 10, 1890 (26 Stat., 131), divided goods into two classes, (*a*) those which must be invoiced, and (*b*) those which need not be invoiced. Personal effects accompanying a passenger need not be invoiced.—*Post* p. 72; p. 74.

(3.) A Captain of a steamship does not cease to be a passenger by being a Captain, and he is not required to invoice goods which, when accompanying any other passenger, it would not be necessary to invoice.—*Post* p. 72; pp. 74–75.

(4.) A Captain of a steamship, who procured a package of diamonds in Antwerp, put it in his state-room at Liverpool, and steamed his ship into the port of Philadelphia, cannot be guilty of smuggling said diamonds, because the law did not require that they should have been invoiced.—*Post* p. 72; pp. 74–75.

VII.— Errors in Rulings as to the Corpus Delicti.

(1.) Without proof of the *corpus delicti* there can be no conviction in a criminal case; if the *corpus delicti* fail of identification, there can be no conviction in a criminal case.—*Post* p. 76; p. 76.

(2.) Where a captain testifies that he was given a package, the property of a stranger in Antwerp, and that he wrote thereon an address, and the package seized had no address thereon; and that he had been in the habit of bringing over small packages; and that he did, and that he did not, know the consignee; it is error for the Court to instruct the jury that they must find the defendant (who was the stranger referred to) guilty if they believe the *testimony* of the captain to be true.—*Post* p. 76; pp. 76–79.

THE UNITED STATES OF AMERICA.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

HERMAN KECK, *Plaintiff in Error.*	No. 15.	Oct. Term, 1898.
	No. 194.	Oct. Term, 1897.
vs.		
THE UNITED STATES, *Defendant in Error.*	No. 551. (16,330)	Oct. Term, 1896.

Brief of Plaintiff in Error on Third Oral Argument

MAY IT PLEASE THE COURT:

On the 25th day of April, 1898, this Court entered the following order, to wit:

"This case is restored to the docket for reargument, and assigned to be heard on the second Monday of next term. Counsel will be limited to one hour on each side, and their attention is directed to the question whether, assuming the diamonds to have been dutiable, the Circuit Court erred *in any of its rulings in respect of what constitutes the crime of smuggling, and in the application of the law to the evidence.*"

We therefore respectfully submit the following brief on the question suggested by the Court to be reargued, to wit:

Statement of the Case.

So much of the case as is pertinent to the question to be reargued, as suggested by the Court in its order of April 25, 1898, is as follows, to wit:

Action to Reverse.—This is an action (record, pp. 118–120) to reverse the judgment of the District Court of the United States for the Eastern District of Pennsylvania, whereby and wherein Mr. Herman Keck, plaintiff in error, was convicted by a jury (record, p. 12) of a violation of Sec. 2865 of the Rev. Stat. of the United States; and was, by the judgment of the Court, sentenced to pay a fine of $200 and be imprisoned and confined in the Eastern Penitentiary of the Commonwealth of Pennsylvania for a term of one year and pay the costs of prosecution (record, pp. 15–16).

Indictment.— On May 18, 1896, at the May Term, 1896, of the District Court of the United States, for the Eastern District of Pennsylvania, an indictment, containing three counts, the second only of which bears on the question directed to be reargued, was returned against Mr. Herman Keck, plaintiff in error (record, pp. 1–2).

Second Count.—The second count charged him with smuggling diamonds contrary to the provisions of Sec. 2865 of the Rev. Stat. of the United States (record, pp. 1–2).

Assignments of Error

The following are the assignments of error (record, pp. 114–118) pertinent to the question to be reargued, as suggested by the Court, to wit:

Tenth.—The Court erred in making the charge to the jury in refusing to state to said jury and give it the followiug instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence introduced in this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on the bill of indictment."

To which refusal so to instruct, the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Twelfth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Thirteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest and delivering the same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Sixteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by defendant, Herman Keck, to wit:

"The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt; a preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt from the evidence that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court, and the Court there upon said it would give a modification of said instruction so requested, and defendant, Herman Keck, thereupon requested the Court to give said instruction as asked, which request the Court refused, and to which refusal and ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Seventeenth.— The Court erred in charging the jury, among other things, as follows, to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To which portion of said charge defendant, Herman Keck, then and there excepted while the jury was still at the bar of the Court.

ARGUMENT.

I.

SMUGGLING DEFINED.

(1) Revised Statutes (2d Ed.), Section 2865, punishing smuggling is Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565).—*Post pp. 6–8.*

(2) It is a first rule in the interpretation of statutes to determine what a legislative body means by what it has said.—*Post pp. 8–9.*

(3) The words of a statute must be understood in the sense which they bore at the time it was adopted. —*Post p. 9.*

(4) Where a word having a well-defined legal meaning at the time of the adoption of a statute is incorporated into a statute it must be given that meaning.—*Post p. 9.*

(5) Where a word having a well-defined meaning at common law at the time of the adoption of a statute is incorporated into a statute it must be given that meaning.—*Post pp. 12–15.*

(6) On the authority of Hawkins, Russell, Gabbet, and Bacon, August 30, 1842, smuggling meant "the bringing on shore or carrying from shore goods and merchandise for which the duty has not been paid or goods of which the importation or exportation is prohibited." When Congress, August 30, 1842, Section 19 (5 Stat., 548, 565), prescribed a punishment for smuggling, the word smuggling should be given its accepted meaning at that date.—*Post pp. 9–12.*

(*a*). *Second Count of Indictment.*

The second count of the indictment is as follows (record, pp. 1–2), to wit:

"And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further present that afterwards, to wit: Upon the day and year aforesaid, the said Herman Keck, late of the District aforesaid,

yeoman, at the District aforesaid, and within the jurisdiction of this court, did knowingly, willfully, and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit: Into the Port of Philadelphia, certain goods, wares and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to wit: Of the value of Ten Thousand Dollars, without paying and accounting for the duty imposed upon the said goods, wares and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced, as aforesaid, were subject to duty by law, and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares and merchandise had not been paid and accounted for, and that the said goods, wares and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

(*b*). *Rev. Stat. (2d Ed.), Sec. 2865, is Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565).*

The second count of the indictment is drawn under the provisions of the Act of February 27th, 1877 (19 Stat., 240, 247), amending Sec. 2865, Rev. Stat. of the United States, to wit:

"SEC. 2865. If any person shall knowingly, and willfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass or attempt to pass through the custom-house any false, forged or fraudulent invoice, every such person, his, her or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

From the passage of the first act of Congress laying a duty on imports July 4, 1789 (1 Stat., 24), down to August 30,

1842, there was no Federal statute punishing smuggling. The Act of August 30, 1842 (5 Stat., 548), provided, among other things, as follows (p. 565), to wit:

"SEC. 19. *And be it further enacted*, That if any person shall knowingly, and willfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass or attempt to pass through the custom-house any false, forged or fraudulent invoice, every such person, his, her or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

This section created two crimes. They are thus stated by *Mr. Justice Nelson* in *United States vs. Sixty-seven Packages of Dry-Goods* (1854), 17 Howard, 85, 93, to wit:

"*It first makes the smuggling of dutiable goods into the country a misdemeanor;* and, secondly, the passing or attempting to pass them through the Custom House, with intent to defraud the revenue, by means of false, forged, or fraudulent invoices; the latter is an attempt which, in effect and result, is very much akin to that of smuggling, except done under color of conformity to the law and regulations of the customs."

Under the Act of June 27, 1866 (14 Stat., 74), the Statutes of the United States were revised. The Act of June 20, 1874 (18 Stat., 113), provided for their publication. The Revised Statutes were approved June 22, 1874, and took effect as of December 1, 1873. Rev. Stat. §§ 5595 and 5601; *United States vs. Bowen*, (1879) 100 U. S., 508, 513.

The Revised Statutes of the United States contained only the latter half of Section 19 of the Act of August 30, 1842 (5 Stat., 548), as Section 2865, as follows, to wit:

"SEC. 2865. Every person who makes out or passes, or attempts to pass through the custom-house any false, forged or fraudulent invoice, or who shall aid or abet in making or passing such false, forged, or fraudulent invoice, shall be

deemed guilty of a misdemeanor, punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than two years, or both, in the discretion of the court."

Under the provisions of Section 5596 of the Revised Statutes, the effect of embodying only the latter half of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), in the Revised Statutes as Section 2865, was to repeal the first half of Section 19. This resulted in the repeal of the statute punishing smuggling. Being obviously an unintentional omission, Congress on February 27, 1877 (19 Stat., 240, 247), restored this portion of Section 19 of the Act of August 30, 1842. The Act of February 27, 1877 (19 Stat., 240), is entitled "An Act to perfect the Revision of the Statutes of the United States," etc., and its first section sets forth that it was enacted "For the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December anno Domini one thousand eight hundred and seventy-three,' so as to make the same truly express such laws, the following amendments are hereby made therein:" It then occupies fourteen printed pages. The result was, that between June 22, 1874, and February 27, 1877, there was inadvertently no Federal statute punishing smuggling.

The Act of March 2, 1877 (19 Stat., 268), provided for the preparation and publication of a second edition of the Revised Statutes of the United States, and Section 2865 as there printed is Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), in its entirety.

(*c*). *Rules and authorities for the interpretation of the word "smuggle."*

It is a first rule of interpretation to determine what a legislative body means *by what has said. United States vs. Wiltberger* (1820), 5 Wheaton 95–96; *Lake County vs. Rollins* (1889), 130 U. S., 662, 670 671; *United States vs. Gold-*

enberg (1897), 168 U. S., 95, 102–103; *Calderon vs. Atlas Steamship Co.* (1898), 170 U. S., 272, 280–281; Wilberforce Statute Law (1881), 102–104.

The question presented would be what meaning was attached to the word "*smuggle*" at the time of the adoption of this statute, August 30, 1842? In *Bridge Proprietors vs. Hoboken County* (1864), 1 Wallace, 116, 148, the question was as to the meaning of the word "bridge," used in a New Jersey statute of 1790. *Mr. Justice Miller* said, among other things (p. 148), that:

"It does not, therefore, follow that when a word was used in a statute or a contract seventy years since, that it must be held to include everything to which the same word is applied at the present day."

This was quoted and approved by *Mr. Justice Bradley* in *Bischoff vs. Wethered* (1869), 9 Wallace, 812, 816.

In Maxwell on Interpretation of Statutes (Third London Ed., 1896) 83, the rule is thus stated:

"The words of a statute must be understood *in the sense which they bore when it was passed.*"

The meaning attached to the word "*smuggle*" August 30, 1842, is shown by numerous authorities.

The first authority to which we refer is Hawkins' Pleas of the Crown, the first edition of which appeared in 1716, and subsequent editions in 1724, 1739, 1762, 1771, 1795, and later. William Hawkins occupied a high position at the bar and became a serjeant. He also published an abridgment of Coke on Littleton and a collection of the British Statutes-at-Large. Two editions of his Pleas of the Crown have come into our hands—the Seventh and Eighth London Editions.

Smuggling is thus defined in 1 Hawkins' Pleas of the Crown (7th London Ed., 1795), 487; (8th London Ed.), 661, to wit:

" Smuggling consists *in the bringing on shore*, or in carrying from the shore, goods, wares or merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited."

The second authority to which we refer is Russell on Crimes, the first edition of which appeared in 1819, and subsequent editions in 1827, 1843, 1851, 1865, 1877, and 1896. Russell occupied a high position at the bar and on the bench, becoming a serjeant and Chief Justice of Bengal, and was knighted as Sir William Oldnall Russell. In addition he published works on Practice and Fines and Common Recoveries.

The following is laid down in 1 Russell on Crimes (London Ed. of 1819), 160, to wit:

" Among the offenses against the revenue laws, that of smuggling is one of the principal. It consists *in bringing on shore*, or carrying from the shore, goods, wares or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited."

The same definition is found at page 111 of the seventh American Edition of 1853, by Sharswood, from the third London Edition; at page 172, of the fourth London Edition of 1865; at page 270 of the fifth London Edition of 1877; at page 172 of the ninth American edition of 1877, by Sharswood; at page 277, of the sixth London Edition; and at page 277 of the International Edition of 1896. These are all of the editions which have come into our hands.

The third authority to which we refer is Gabbet's Criminal Law, which appeared in 1835. Joseph Gabbet was an author upon other subjects, and in 1812 published a Digestive Abridgment and Comparative View of the Statute Law in England and Ireland, analytically arranged on the order of Blackstone's Commentaries, and of which a second edition appeared in 1841.

The following is laid down in 1 Gabbet's Criminal Law (London Ed. 1835) 848, to wit:

"Smuggling is an offense against the revenue laws, which consists in *clandestinely bringing on shore* or carrying from shore goods, wares, or merchandise for which the duty has not been paid, or goods of which the importation or exportation is prohibited."

The fourth authority to which we refer is Bacon's Abridgment, the first edition of which appeared in 1736–1762, and subsequent editions in 1768–70, 1778, 1798, 1807, 1832, 1842–1856, and 1876. Matthew Bacon was also the author of a treatise on Leases and Terms of Years. The second American Edition of Bacon's Abridgment was edited by John Bouvier (author of the celebrated Law Dictionary), and appeared between the years 1842 and 1856 in ten volumes. Another of the Bouvier editions was published in 1876. It is said in Marvin's Legal Bibl. that "this work is probably in more general use in the United States than any other English Abridgment of the Common Law."

The following is laid down in 6 Bacon's Abridgment (5th Lond. Ed.), 258, to wit:

"Smuggling consists *in the bringing on shore* or carrying from the shore goods and merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited."

The same definition is found in volume 7, page 313, of the seventh London Edition of 1832, and in volume 9, page 106 of the American Edition of 1876 by John Bouvier, the only three editions which have come into our hands.

In *Dunbar vs. United States* (1895), 156 U. S., 185, 193, *Mr. Justice Brewer* said that smuggling is "the fraudulent taking into a country, or out of it, merchandise which is lawfully prohibited." There is nothing in this definition which conflicts with the authority of Hawkins, Russell, Gabbet, and Bacon. In this case it was claimed that all the counts in the indictment, except one, were insufficient because no *scienter* was alleged. To show that the word smuggle implied knowl-

edge, *Mr. Justice Brewer* gave the definition quoted. The Court did not have before it and did not decide whether taking on shore was or was not necessary to constitute smuggling, or whether the definition given meant or did not mean taking on shore. *Mr. Justice Brewer* cites 2 Bouvier, 528; Bouvier cites Bacon, Abr. *Smuggling;* and Bacon defines smuggling as already given (*ante*, p. 11). Two classes of cases fall within the term smuggling, as defined by Hawkins, Russell, Gabbet, and Bacon: (1) *Where it is not prohibited* to take goods on shore, but where a duty accrues upon bringing certain dutiable goods into port with intent to land, and to take such dutiable goods on shore without paying the duty constitutes smuggling; (2) *Where it is prohibited* to take certain named goods on shore, and to take such prohibited goods on shore constitutes smuggling. Bouvier gave but the latter half of Bacon's definition.

It thus appears that the word "*smuggling*" has a well-defined legal meaning. It is a rule of interpretation, that if a word used in a statute have a well-defined legal meaning, such word shall be given that meaning. *The Abbotsford* (1878), 98 U. S., 440, 444; *United States vs. Palmer* (1818), 3 Wheaton, 610, 630; *United States vs. Smith* (1820), 5 Wheaton, 153, 159–160; *United States vs. Davis* (1829), 5 Mason, 356; *Moore vs. United States* (1875), 91 U. S., 270, 274; *Smith vs. Alabama* (1887), 124 U. S., 465, 478–479; *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, 653–654, 654, 655, 662, 679–680, 707; Black on Interpretation (1896), 130; Sutherland on Statutory Construction (1891), 331, 333; Wilberforce Statute Law (1881), 124–125; Hardcastle Construction of Statutes (2d Ed., 1892), 184–185; Maxwell on Interpretation (3d Ed., 1896), 2–3; 1 Kent's Commentaries, 462; *Grogan vs. Garrison* (1875), 27 Ohio St., 50, 63. And although there are no common-law crimes against the United States Government (*United States vs. Britton* (1883), 108 U. S., 199, 206; *United States vs. Eaton* (1892), 144 U. S., 677, 687), yet when a Federal

law prescribes a punishment for a common-law crime by name, without defining it, the common-law definition is impliedly adopted as part of the statute. *United States vs. Palmer* (1818), 3 Wheaton, 610, 630, 636, 640; *United States vs. Smith* (1820), 5 Wheaton, 153, 160; *United States vs. Davis* (1829), 5 Mason, 356, 362; *Swearingen vs. United States* (1896), 161 U. S., 446, 451; *Turner vs. State* (1853), 1 Ohio St., 422, 424–425; Black on Interpretation of Laws (1896), 130; *Mr. Justice Matthews* in *Smith vs. Alabama* (1887), 124 U. S., 465, 478–479; *Mr. Justice Gray* in *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, 654, 655, 662, 679–680, and dissenting opinion of *Mr. Chief Justice Fuller* in the same case at page 707.

In *United States vs. Palmer* (1818), 3 Wheaton, 610, the defendant was indicted for robbery in violation of the Act of April 30, 1790 (1 Stat., 112–19). *Mr. Chief Justice Marshall* said, among other things (p. 630), that:

"Of the meaning of the term robbery, as used in the statute, we think no doubt can be entertained. It must be understood in the sense *in which it is recognized and defined at common law.*"

Mr. Justice Johnson, who delivered a concurring opinion, said (at p. 640) that:

"The second question proposed in this case is one on which, I presume, there can be no doubt. *For the definition of robbery under this act we must look for the definition of the term in the common law or we will find it nowhere;* and according to my construction super-add to that definition the circumstance of its being made punishable with death, under the laws of the United States, if committed on land, and you have described the offense made punishable under this section."

In *United States vs. Smith* (1820), 5 Wheaton, 153, *Mr. Justice Storey* (at pp. 159–160) said:

"But supposing Congress were bound in all the cases included in the clause under consideration to define the offense, still there is nothing which restricts it to a mere

logical enumeration in detail of all the facts constituting the offense. *Congress may as well define by using a term of a known and determinate meaning* as by an express enumeration of all the particulars included in that term. That is certain which is by necessary reference made certain.' When the Act of 1790 declares, that any person who shall commit the crime of robbery or murder on the high seas shall be deemed a pirate, *the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law.* In fact, *by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act.* In respect to murder, where 'malice aforethought' is of the essence of the offense, even if the common-law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of 'malice aforethought' *would remain to be gathered from the common law.* There would then be no end to our difficulties or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the constitution is, therefore, wholly inadmissible. To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and *this may be done either by a reference to crimes having a technical name and determinate extent*, or by enumerating the acts in detail upon which the punishment is inflicted."

In *United States vs. Davis* (1829), 5 Mason, 356, the defendant was indicted for larceny in violation of the Act of April 30, 1790 (1 Stat., 112–119). *Mr. Circuit Justice Storey* (at p. 362), said:

"An indictment on the Act of 1790 lies only where the offense is committed in respect to the 'personal goods' of another. *To ascertain what is the meaning of these words we must resort to the common law, for that furnishes the proper rule of interpretation.*"

In *Swearingen vs. United States* (1896), 161 U. S., 446, the defendant was indicted for a violation of Sec. 3893, Rev. Stat. *Mr. Justice Shiras* said, among other things (p. 451), that:

"The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, *and have the same meaning as is given them at common law in prosecutions for obscene libel.* As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit."

In Black on Interpretation of Laws (1896), 130, the rule is stated thus:

"Where a word or phrase has a clear, definite, and settled meaning at common law, it is to have the same meaning in the construction of a statute in which it is found."

It follows, therefore, that the word "*smuggle*," found in Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865 of the Rev. Stat., must be given the same meaning as that found in Hawkins, Russell, Gabbet, and Bacon, high authorities when this statute was adopted.

II.

Rulings of Court Assigned for Error as to Smuggling thus Defined.

(1.) **Criminal statutes are to be strictly construed, and cannot be extended by construction to cover cases not falling within their terms. There are no constructive crimes. When Congress has not made an act punishable, a court cannot enlarge a statute. An act not within the language of a statute is not within the statute because it is of equal atrocity or of a kindred character with those acts which are enumerated. To say that a case is within a criminal statute because within its reason, is to legislate and not to interpret legislation. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, will justify any judicial addition to the language of a statute. A court, in interpreting a statute, cannot hold that Congress must have intended to do that which it has failed to do. Congress is presumed to know the meaning of words, and words are to receive their plain and literal meaning even though the intention of Congress may have been different from that expressed.—** *Post*, **pp. 21–25.**

(2.) Obtaining diamonds in Europe with the intention of smuggling into America, omitting to get a consular invoice, placing them in a state-room on a steamship at Liverpool, omitting them from the steamship's manifest, steaming the ship into the high seas, steaming the ship into the port of Philadelphia, accompanied with an intention to smuggle, and not taking the diamonds on shore, while such acts may constitute the distinct offenses of omitting from the manifest, or importing contrary to law, or failing to produce the manifest, they do not constitute the crime of smuggling within the meaning of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.).—*Post*, pp. 25–28.

(*a.*) *The facts and the evidence.*

The only witness on behalf of the United States testifying directly to the alleged transaction was Captain Frank Loesewitz. He testified that he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man, and captain of the steamer Rhynland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium, Mr. Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Van Hammelrick came with a person whom the witness identified in court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish. While they were sitting there, Mr. Van Ham-

melrick took a small package from his pocket, showed it to witness, and said: "This package belongs to that person here," and Van Hammelrick further said to witness: "Will you oblige me, and take that over to America? It belongs to him; it belongs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table, and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati — either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the café a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. When witness went aboard his ship he put the package in a drawer in his state-room. Witness sailed January 29, 1896.

When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (record, p. 27), to wit:

Q. "What took place when you reached the port of Philadelphia?"

A. "When I reached the port of Philadelphia, after the passengers were landed, two gentlemen entered my room, and they said they had information from Antwerp, that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that is a package of diamonds you have got to be sent to Cincinnati, and if I did not deliver it I would be arrested.' After a while, I went down in my room and brought the package up, and delivered it over to the Treasury agents. That is all that happened."

The witness further testified (record, pp. 36–37), that he had been in the habit of bringing over small packages in the same way he had brought this package, and that after the vessel had been docked he would go to a custom officer on

the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

Treasury agent John C. Gallen testified (record, pp. 43–45), as follows:

Q. "When did the Custom House Inspectors get on board the Rhynland?

A. "The weather was very rough that day and the boarding officer boarded just as she was coming into the dock. I then asked one of the Custom Inspectors to examine closely the baggage of one or two of the cabin passengers whom I suspected, to ascertain whether they had any large quantity of jewelry, after which I went into the chart-room, where the Captain was with Special Agent Cummings. I spoke of the weather and other topics, and then I said: 'Captain'—to whom I was unknown—'you have a package for the Coeterman's Diamond Company—Coeterman-Keck Diamond Company, 24 West Fourth Street, Cincinnati, Ohio?' I repeated the name of the company. He said: 'No; I have no such package.' I said: 'I beg leave to differ with you,' and indicating with my fingers, I said: 'You have a small package which you received while in Antwerp.' He said: 'I have a package for Van Reeth, of 21 West Fourth Street, Cincinnati, Ohio, and I will give it to you if you have an order for it.'"

Q. "At that time, I understand you to say, he did not know you were a treasury agent?"

A. "No, sir; I was unknown."

Q. "Had you ever met him before?"

A. "Never met him before to know him. I then said: 'Captain, I have an order for them.' He said: '*Show me the order, and I will go and get the package.*' I replied: 'Captain, I would like to see the package first *before delivering the order*, and I want to speak to you in private.'"

Q. "Was there anything on your clothes like a badge, or anything else to show what you were?"

A. "No, sir; none whatever. He was doing some writing at the time—I think finishing the log—and he asked me to wait until he finished, and I said, 'Certainly.' After the lapse of about five minutes the Captain arose and said: 'You remain here, and I can go and get the package.' As soon as the Captain left the chart-room, I, quietly and unperceived by him, followed him and saw him enter his room, and just as he emerged he had a package in his hand. As soon as I saw it, I said: 'Captain, that is the package I want.' He said: '*Where is your order?*' *I produced my card as United States Treasury Agent. He refused to let me have it until I*

was identified as a Custom-House Officer. A young man present at the conversation opposite the Captain's room, who represented the Steamship Company; we agreed to go back to the chart-room, where I again insisted on getting this package, and this young man, who represented the Steamship Company, who was present, *advised the Captain to give the package to me, which the Captain did.* I then searched thoroughly the Captain's room, and also other parts of the vessel, but did not find any other dutiable stuff, after which I went into the chart-room again, and opened the package in the presence of the Captain—broke the seal and opened the package."

* * * * * * * * * *

Q. "You asked him for the diamonds, and you took them?"

A. "Yes, sir."

Q. "Did you tell him why?"

A. "No, sir."

Q. "*Did you tell him by what authority?*"

A. "*Yes, sir; I told him I was United States Treasury Agent, and this package containing diamonds was not on the manifest.*"

Special Treasury Agent James C. Cummings testified (record, p. 59), as follows:

Q. "Tell us in your own way what occurred?"

A. "I think it was about the time that the Captain said to Mr. Gallen that he had a package for Van Reeth that I came into the Captain's chart-room."

Q. "You were not in when Gallen started the conversation?"

A. "No, sir; I came in as the Captain said he had a package for Van Reeth, Cincinnati."

Q. "Did you hear whether he was asked that question before he answered it?"

A. "That I do not know.

Q. "You just heard him say that as you entered?"

A. "Yes, sir; he then asked Mr. Gallen if he had an order for the package and Mr. Gallen said that he had, and the Captain said: '*Give me the order and I will give you the package.*' Then Gallen said: 'Give me the package and I will show you the order.' After the Captain had finished writing off his log book, the Captain said he would go down and get it. He started down and Mr. Gallen followed him down to the room, and I went down also, and the Captain produced the package down in his room."

Q. "Where did he have it?"

A. "In his room."

Q. "He produced it?"

A. "Yes, sir."

Mr. Herman Keck, plaintiff in error, never was on board the Rhynland, and his testimony is a direct and categorical denial of the statements made by Captain Frank Loesewitz, as to all matters directly affecting Mr. Keck.

(*b.*) *The rulings of the Court.*

Mr. Herman Keck, plaintiff in error, requested the Court to give to the jury the following binding instruction (record, p. 110), to wit:

"The jury are instructed that there is insufficient evidence introduced into this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on both bills of indictment."

This was refused by the Court, and an exception taken (record, p. 112), and was assigned as number ten in the assignments of error (record, p. 116).

Mr. Herman Keck, plaintiff in error, requested the Court to give to the jury the following binding instruction (record, p. 110), to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of each Bill of Indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of both Bills of Indictment."

This was refused by the Court, and an exception taken (record, p. 112), and was assigned as number twelve in the assignments of error (record, p. 116), and in the petition for a writ of error (record, p. 119).

The Court, in its charge, said to the jury (record, p. 112):

"*Gentlemen of the Jury*—The several statutory provisions under which the defendant is indicted have been read to you, and are doubtless understood. I need not undertake to explain them or to dwell upon the law governing the case. *It is sufficient to say in this respect, that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged.*"

To the following part of the foregoing language an exception was noted (record, p. 113), to wit:

"It is sufficient to say in this respect that *if the statements made here under oath by Captain Loesewitz* respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

This constitutes assignment of error number seventeen (record, p. 118).

Assignment number sixteen in the assignments of error (record, p. 117–118), refers to the answer of the Court to the request for special instruction number ten. The Court said (record, p. 112), to wit:

"The Court affirms the tenth point generally, but the meaning ascribed to it by the Court is that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the *smuggling* charged, *as testified to by Captain Loesewitz;* and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

An exception was taken to this answer of the Court (record, p. 112), and the ruling of the Court was assigned as number sixteen in the assignments of error (record, pp. 117–118).

Assignment number thirteen in the assignments of error (record, p. 117), will be more specifically noted hereafter.

(*c.*) *Rules governing application of criminal statutes to facts.*

We are interpreting a criminal statute, and there are no constructive crimes. 1 Blackstone, 88. This court, in an unbroken line of decisions from 1820 to 1898, has repeatedly and consistently refused to make crimes by construction or implication. In *United States vs. Wiltberger* (1820), 5 Wheaton, 76, the defendant was indicted for manslaughter in violation of Section 12 of the Act of April 30, 1790 (1 Stat. 112, 115). Section 12 punished manslaughter committed on

the high seas. Wiltberger was charged with killing Benjamin Rush "in the river Tigris, in the empire of China, off Wampoa, and about 100 yards from shore, in four and a half fathoms of water, and below the low-water mark, thirty-five miles above the mouth of the river." The eighth section of the act punished murder on the high seas, river, haven, basin, or bay. In holding that no crime had been committed in violation of the statute, *Mr. Chief Justice Marshall* said (p. 95):

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment."

And again (p. 95–96):

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

And again (p. 96):

"To determine that a case is within the intention of a statute its language must authorize us to say so. *It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of kindred character with those which are enumerated.* If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation which it would be unsafe to consider as precedents forming a general rule for other cases."

And again (p. 105):

"From this review of the examination made of the act at the bar, it appears that *the argument chiefly relied on to prove that the words of one section descriptive of the place, ought to be incorporated into another, is the extreme improbability that Congress could have intended to make those differences with respect to place which their words import. We admit that it is extremely*

improbable. But probability is not a guide which a court in construing a penal statute can safely take. We can conceive no reason why other crimes, which are not comprehended in this act, should not be punished. *But Congress has not made them punishable, and this Court can not enlarge the statute.*"

In *United States vs. Chase* (1890), 135 U. S., 255, the defendant was indicted for mailing an obscene letter in violation of the act of July 12, 1876 (19 Stat., 90). In holding the indictment insufficient *Mr. Justice Lamar* said (p. 261):

"Another argument on which indictments of this character have been sustained by some of the Circuit Courts is, that a reasonable construction must be given the statute, and it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial whether the thing prohibited is inside or outside of an envelope, and therefore unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope, but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. *But this Court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress.*"

In *Sarlls vs. United States* (1894), 152 U. S., 570, defendant was charged with introducing beer into the Indian Territory in violation of Section 2139, Revised Statutes, forbidding the introduction of ardent spirits, spirituous liquors and wines into the Indian Territory. The conviction was set aside (p. 575) because the statute being penal the words of the statute could not be construed to cover beer by implication.

In *Swearington vs. United States* (1896), 161 U. S., 446, the defendant was indicted for mailing a newspaper containing very violent, coarse, and vulgar language as a violation of Section 3893, Revised Statutes. In setting aside a conviction *Mr. Justice Shiras* said (p. 451):

"The words 'obscene,' 'lewd,' and 'lascivious' as used in the statute signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. *As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.*

"Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and as applied to an individual person, plainly libelous. But we can not perceive in it anything of a lewd, lascivious, and obscene tendency calculated to corrupt and debauch the minds and morals of those into whose hands it might fall."

In *France vs. United States* (1897), 164 U. S., 676, the defendants were indicted for conspiracy to violate the act of March 2, 1895 (28 Stat., 963). The statute prohibited inter-state commerce in any paper, certificate or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery or an advertisement of a lottery. The defendants carried "official prints" and "hit-slips" of the drawings. In setting aside the convictions *Mr. Justice Peckham* said (pp. 682–683):

"The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, *we can not sustain a conviction on that ground.* Although the objection is a narrow one, *yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly.* * * * *If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation.*"

Calderon vs. Atlas Steamship Company (1898), 170 U. S., 272, involved the interpretation of a bill of lading. *Mr. Justice Brown* said, among other things (pp. 280–281), that:

"*In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed.* It was said of penal statutes by *Mr. Chief Justice Marshall* in *United States vs. Wiltberger*, 5 Wheat, 76, 95, that: 'The

intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so.'"

The case of *United States vs. Goldenberg* (1897), 168 U. S., 95, decided a year before the foregoing case, stated the same doctrine. The time within which duties should be paid after protest was under discussion. It was urged that the words of the statute should not be literally interpreted. In holding they should be *Mr. Justice Brewer* said (pp. 102–103) that:

"The primary and general rule of statutory construction is that the *intent* of the law-maker *is to be found in the language* that he has used. *He is presumed to know the meaning of words* and rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. * * * *No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.* * * * Certainly there is nothing which imperatively requires the court to supply an omission in the statute, *or to hold that Congress must have intended to do that which it has failed to do.*"

(*d.*) *The facts do not make out a case of smuggling.*

Congress has enacted numerous statutes and sections thereof, touching matters pertaining to the revenue, each reaching a specific act or omission. Whatever statute, if any, the acts testified to violate, they do not fall within Rev. Stat., Sec. 2865, under which the second count of the indictment is drawn. The regular course in shipping merchandise to America is as follows: The invoice is taken to the American Consul at the place where the merchandise is purchased, and is duly certified to by the Consul. Act of June 10, 1890 (26 Stat., 131). An omission to get a consular invoice is not smuggling. The next step is to put the goods on board the ship. That does not constitute smuggling. The next step

is for the Captain of the vessel to put the goods on his manifest. Rev. Stat., Sec. 2806. An omission so to do is not smuggling, but is a distinct offense of omitting goods from the manifest. Rev. Stat., Sec. 2809. The next step is to steam or sail the vessel from the port of departure into the high seas. That is not smuggling. The next step is to steam or sail the vessel into port. *It is not until after the vessel comes within the port that an obligation arises to pay duty. United States vs. Vowell* (1809), 5 Cranch., 368; *Arnold vs. United States* (1815), 9 Cranch., 104, 120; *Hartranft vs. Oliver* (1888), 125 U. S., 523, 528; *Sherman vs. Robertson* (1889), 136 U. S., 570; *Seeberger vs. Schweyer* (1894), 153 U. S., 609; Carr on Judicial Interpretation of the Tariff Acts, Sec. 97, pp. 44–45. The goods on board the ship in port are, within the meaning of the law, in the custody of the Custom-house officer. *Mr. Justice Field*, in *Hartranft vs. Oliver* (1888), 125 U. S., 525, 528. Therefore, bringing the ship into port, is not smuggling. If the importing were wrongful, it constituted the crime of importing contrary to law. Rev. Stat., Sec. 3082. The next step is to produce the manifest. Rev. Stat., Secs. 2811, 2812. An omission to produce the manifest is not smuggling, but a distinct offense under Rev. Stat., Sec. 2814. The goods cannot be removed without the consent of the Custom-house Inspector. *Mr. Justice Field*, in *Hartranft vs. Oliver* (1888), 125 U. S., 525, 528. To take the dutiable goods on shore without paying the duty is smuggling. 1 Hawkins' Pleas of the Crown (7th London Ed.), 487; *ante*, pp. 9–10; 1 Russell on Crimes (London Ed., 1819), p. 16; *ante*, p. 10; 1 Gabbet's Criminal Law (London Ed., 1835), 48; *ante*, pp. 10–11; and 6 Bacon's Abridgement (5th London Ed.), 258; *ante*, p. 11; made a misdemeanor by Section 19 of the Act of August 30, 1842 (5 Stat., 548), now Sec. 2865, Rev. Stat.

The diamonds were never taken from the ship, and were never taken on shore. Captain Loesewitz, John C. Gallen,

and James C. Cummings all testified that the diamonds were not taken from the ship, and were not taken on shore, and that they were seized on board the ship Rhynland by Treasury Agent John C. Gallen (*ante*, pp. 16–20).

It was well said in 6 Bacon's Abridgement (5th Ed.), 286, that:

"As the offense of *smuggling is not complete* unless some goods, wares, or merchandise *are actually brought on shore*, or carried from shore contrary to law, a person may be guilty of divers practices which have a direct tendency thereto, *without being guilty of the offense.*"

And the same is found in volume 7, page 354, of the seventh London Edition of 1832, and in vol. 9, page 140, of the American Edition of 1876 by John Bouvier, the only three editions which have come into our hands.

(*e.*) *Assignments of error.*

It, therefore, follows that assignment of error number ten (*ante* p. 20) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the bill of indictment. The third count of the bill of indictment had been disposed of when the Court gave instruction number seven to find the defendant not guilty thereon (record, p. 111), and the first count is clearly bad, as has been heretofore presented in our former briefs. (Original Brief, pp. 22–25; Revised Brief, pp. 23–26; *Brief in Reply, pp. 1–12.*)

It also follows that assignment number twelve (*ante* p. 20) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the second count of the bill of indictment, which is the count charging the defendant with smuggling.

It also follows that assignment of error number seventeen (*ante* pp. 20–21) is well taken, because the Court instructed the jury to find the defendant guilty if they believed "*the state-*

ments made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here."

It also follows that assignment of error number sixteen (*ante*, p. 21) is well taken, because the Court, in response to a request for a special instruction, told the jury that they must find the defendant guilty if they find the defendant guilty "*of the smuggling charged as testified to by Captain Loesewitz.*"

III.

The Definition in the Anti-Moiety Act Does Not Apply.

(1.) What Congress means is to be determined by what Congress *says*. Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), defines smuggling "for the purposes of this act." Congress having thus given a definition of smuggling "for the purposes of this act," that definition can not be extended by implication or construction to another act. The same word used in several acts of Congress may have a different meaning in each act. Where Congress has defined a word "for the purposes of this act," courts are not at liberty to strike out these words or add the interpreting clause to another statute. The words are sensible, and have a decided influence on the meaning of the act in which they are used, and to strike them out, or to ignore the words, "for the purposes of this act," and arbitrarily add this special interpreting clause of one act to another act is making very free with legislative language, and amounts to judicial legislation.—*Post pp. 29-37.*

(2.) The definition of the word smuggle, "for the purposes of this act," contained in the proviso to Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), can not be given the word smuggle in Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.).—*Post pp. 29-37.*

(*a.*) *The Anti-moiety Act—interpreting clause therein.*

It was contended on the two former oral arguments of this case by the learned Assistant Attorneys General and District Attorney and in two of the briefs submitted by them, that the definition of the word "smuggle" contained in Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), is to be given the word "smuggle" contained in Sec. 19, Act of Aug. 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.). The definition of the word "smuggle," as contained in the Anti-moiety Act, is by the terms of that act *expressly confined to that act*, in the following language, to-wit:

"SEC. 4. That whenever any officer of the customs, or other person, shall detect and seize goods, wares, or merchandise, in the act of being smuggled, or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award, not exceeding in amount one-half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs, and charges connected therewith.

"*Provided, That for the purposes of this act* smuggling shall be construed to mean *the act*, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States dutable articles without passing the same, or the package containing the same, through the custom-house, or submitting them to the officers of the revenue for examination," etc., etc.

(*b.*) *The interpretation, application, and effect of the interpreting clause.*

What Congress meant is to be determined *by what Congress has said* (*ante*, pp. 8–9, for authorities). Congress has distinctly said that smuggling should be construed to mean certain things "*for the purposes of this act.*" Congress did not merely say "smuggling shall be construed to mean," but "*that for the purposes of this act* smuggling shall be construed to mean." And the language is not "smuggling shall be construed to *include*," but "smuggling shall be construed to *mean*."

It is stated in Sutherland on Statutory Construction (1891), 441, as follows:

"The expression '*this act*' can not be taken to include another act *in pari materia*."

Black on Interpretation of Laws (1896), 195, lays down this rule:

"An interpretation given in a statute *is to be restricted to the purposes and effects of that statute*, and not made a general rule of law. * * * * * * A distinction has also been taken between interpretation clauses which are incorporated in, *and apply to only one particular act* of the legislature, and those which form a part of an entire code, revision, or compiled body of laws, and are intended to govern the whole."

In *King vs. Trustees* (1836), 5 Adolphus & Ellis, 563, *Patteson, J.* (at pp. 577–578), said:

"As to the question whether the certiorari be taken away, Stat. 4G., 4c., 95s., 87, is not applicable to this proceeding, which, as conceded, is under Stat. 3G., 4c., 126, and neither entirely nor partially under Stat. 4G., 4c., 95; and the clause as to the certiorari, in Sec. 87, of Stat. 4G., 4c., 95, is expressly confined to proceedings '*had or taken in pursuance of this act*.' Thus far the plain words of the legislature. But then, it is said, that this Eighty-seventh Section of Stat. 4G., 4c., 95, gives an appeal against things done 'in pursuance of this act, or the said recited act, or any local act' for turnpike roads, and that the certiorari must be taken away co-extensive with the grant of the right of appeal. If the legislature meant this, they have not said it. In the first place they speak merely of '*this act*;' in the next, of 'the said recited act' and 'any local act' also. *They must, therefore, mean different things in the two places.*"

In *Rex vs. Bond* (1818), 1 Barnewall & Alderson, 390, defendant was indicted for setting up a still without license, and fined £200. The following are the opinions of the judges in full setting aside the conviction (pp. 392–393):

"*Lord Ellenborough, C. J.* There is a very inconvenient practice prevailing, and most especially in revenue acts, of imposing penalties by reference, as is done in this case. It has crept in by degrees, but is, I am afraid, now become inveterate. It produces this great evil, that no one, whilst this mode is adopted, can know what forfeitures he is incurring for any particular offense. Here the 26 G. 3 c. 73 s. 13 refers to some former statute, imposing a penalty on persons

actually using a back or still. Now, on examination, we do find one which imposes a penalty of £20 on persons who set up or use a still. But we do not find any one which in terms imposes a penalty of £200. Can we, then, infer that any such act has an existence? As to the antiquity of the statute imposing the smaller penalty, we have nothing to do with that. The legislature may, if they please, act upon it; but *we must take the law as we find it, and cannot, without authority, elevate one penalty into another.*"

"*Bayley, J.* Concurred."

"*Abbott, J. It would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty, when the express words of the act of parliament do not authorize it.*"

"*Holroyd, J.* Concurred. *Conviction quashed.*"

In the matter of *The East India Interest* (1825), 3 Bingham, 193, in the House of Lords, *Lord Chief Justice Best* said (at p. 196) that:

"This is a penal statute, and must, according to the rules by which acts of parliament are construed, receive a strict interpretation. Our law will not allow of constructive offenses; no man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute imposing such penalty. The meaning of the words of an act of parliament is to be ascertained from the subject to which it refers, *so that the same words receive a very different construction in different statutes.*"

To make the definition of smuggling contained in section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), applicable to the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865 Rev. Stat. (2d ed.) *it is necessary to strike out seven words* from the Anti-moiety Act, to wit, the words "*that for the purposes of this act.*"

In *United States vs. Wiltberger* (1820), 5 Wheaton, 76 (*ante*, pp. 21–23), it was contended that the words "river, haven, basin or bay," contained in the eighth section could, be engrafted on section nine after the word "high seas," and, therefore, in section twelve after the word "high seas," the same being the obvious intention of the legislature. In denying this contention, *Mr. Chief Justice Marshall* (p. 95) said, "It is the

legislature, not the court, which is to define a crime, and ordain its punishment." It was next contended that had the words "on the high seas" been omitted in sections nine and twelve, reference might have been had to the words "high seas or in any river, haven, basin or bay" contained in the eighth section, and that, therefore, the court should strike out the words "on the high seas" in the ninth and twelfth sections, and thus carry out the obvious intention of Congress. But *Mr. Chief Justice Marshall* denied this contention as follows (pp. 99–100), to wit:

"It has been argued, and, we admit, with great force, that in this section (9th) the legislature intended to take from a citizen offending against the United States, under color of a commission from a foreign power, any pretense to protection from that commission; and it is almost impossible to believe that there could have been a deliberate intention to distinguish between the same offense, committed under color of such commission, on the high seas, and on the waters of a foreign State, or of the United States, out of the jurisdiction of any particular State. *This would unquestionably have been the operation of the section, had the words 'on the high seas,' been omitted. Yet it would be carrying construction very far to strike out those words. Their whole effect is to limit the operation which the sentence would have without them; and it is making very free with legislative language, to declare them totally useless, when they are sensible, and are calculated to have a decided influence on the meaning of the clause.*"

In *Bate Refrigerating Co. vs. Sulzberger* (1895), 157 U. S., 1, *Mr. Justice Harlan*, in interpreting the patent laws, used some expressions which well state some first principles of hermeneutics. At p. 31 he said:

"We do not see how any language could have been employed that would more clearly express the legislative design."

Again, at pp. 35–36:

"We cannot super-add, in Section 4887 of the Revised Statutes, the words 'prior to the application,' either after the words 'first patented or caused to be patented in a foreign

country,' or after the words 'previously patented in a foreign country,' without defeating the intention of Congress as manifested by the language it selected to indicate its purpose."

Again, at pp. 36–37:

"In our judgment, the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action."

So in the case at bar it would be carrying construction very far and making very free with legislative language to strike out the words "that for the purposes of this act." That no implication might be attempted to be indulged in, and as an express legislative interdiction against applying the definition to any other statute it is expressly provided that smuggling shall mean certain things "*for the purposes of this act.*" Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), does not provide for the punishment of smuggling, and Mr. Herman Keck, plaintiff in error, was not and could not be indicted for a violation thereof. The first half of section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), was inadvertently omitted from the Revised Statutes which were approved by the President June 22, 1874, and which took effect as of December 1, 1873 (*ante* pp. 6–8). The Anti-moiety Act was, by a mere coincidence, approved June 22, 1874 (18 Stat., 186). The accidental omission of many matters from the revision, including the first half of section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), led Congress, February 27, 1877 (19 Stat., 240, 247), to perfect the revision in, among other ways, the full restoration of section 19 of the Act of August, 1842 (*ante* p. 8). Congress ordered a new edition of the Revised Statutes, and section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), appears as section 2865 therein (*ante* p. 8). If Congress intended, on June 22, 1874, to make a statutory definition of smuggling for all purposes, it would have been

easy for Congress to have said so, but Congress did not. If, after the temporary and unintentional suspension of the first half of section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), from June 22, 1874, to February 27, 1877, it was not intended to have merely restored section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), it was easy for Congress to have said so. If Congress intended to make a change, it would have been easy at the same time in the same act, February 27, 1877, to have provided that the words, "that for the purposes of this act," be stricken from Section 4 of the Act of June 22, 1874 (18 Stat., 186), or to have provided that the word smuggle in the Act of February 27, 1877 (19 Stat., 240, 247), should have the same meaning as the word smuggle in the Act of June 22, 1874 (18 Stat,, 186). But Congress did not do so. (See authorities, *ante* pp. 8–9; pp. 21–25). On the contrary, the Act of February 27, 1877 (19 Stat., 240, 247), expressly stated that its purposes were to correct errors and supply omissions and *perfect* the revision (*ante* p. 8). The language of Sec. 2865, Rev. Stat. (2d Ed.), is identical with that of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565). The Act of February 27, 1877 (19 Stat., 240, 247), amending Rev. Stat. (1st Ed.), Sec. 2865, restoring Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), is a criminal statute, and cannot, by implication, be construed to include a part of another statute passed some three years prior thereto, especially when such prior act contained an interpreting clause expressly limited to itself. (See authorities, *ante* pp. 21–25, 29–32).

(*c.*) *Dictum in the Claflin Case.*

The learned Assistant Attorney-General relies on a *dictum* of *Mr. District Judge Benedict* in *United States vs. Claflin* (1875), 13 Blatchford, 178. The question before the learned District Judge was as to the sufficiency of an indictment drawn under Section four (4) of the Act of July 18, 1866 (14 Stat., 178, 179),

after the revision, Sec. 3082, Rev. Stat., punishing "importing contrary to law." Therefore he did not have before him any question as to the meaning of the word "smuggle" contained in Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.). At the date of the alleged crime, the indictment and the opinion of *Mr. District Judge Benedict* that part of Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), punishing smuggling had been inadvertently repealed when the President approved the Revised Statutes, June 22, 1874, (*ante* pp. 7–8). It was even claimed by the learned Assistant Attorney-General that Sec. 4 of the Act of July 18, 1866 (14 Stat., 179), afterwards Sec. 3082, repealed Sec. 19 of the Act of August 30, 1842 (5 Stat., 546, 565), by implication. But how this helps his argument is not clear, and in it he is also clearly in error. Section 4 of one act is directed against "*importing contrary to law*," while Section 19 is directed against "*smuggling and clandestinely introducing into the United States*." The Act of July 18, 1866 (14 Stat., 178), as its title indicated, may subserve the purpose of *preventing* smuggling by the enforcement of its forty-four sections, which cover eleven printed pages, while Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), provides for the *punishment* of a person who has actually committed smuggling. It is a well-settled rule that repeals by implication are not favored, and one statute does not impliedly repeal another, unless the two statutes cover the same subject matter, and are clearly, explicitly, and directly repugnant to each other, and can not be reconciled, and can not from their nature co-exist. *United States vs. Greathouse* (1897), 166 U. S., 601, 605; *United States vs. Healey* (1895), 160 U. S., 136, 147; *Frost vs. Wenie* (1895), 157 U. S., 46, 58; Black on Interpretation (1896), 112; Sutherland Stat. Con. (1891), 179–180; Wilberforce Statute Law (1881), 310; Hardcastle Const. of Stat. (2d Ed., 1892), 345–346; Maxwell on Interpretation (3d Eng. Ed., 1896), 214, 255. That Sec. 4 of the Act of July

18, 1866 (14 Stat., 178), now Sec. 3082, Rev. Stat., meant something different from Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), is clearly apparent from the fact that although when the latter half of said Section 19 was embodied as Sec. 2865, Rev. Stat., the first half was expressly, although inadvertently, repealed by Sec. 5596, Rev. Stat., yet Congress, Feb. 27, 1877, passed an act (19 Stat., 240, 247) restoring Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), and which became Sec. 2865, Rev. Stat. (2d Ed.) (*ante* pp. 6–8).

If it be said that the opinion of *Mr. District Judge Benedict* is a decision as to the meaning of the word smuggle, contained in Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Rev. Stat., Sec. 2865, what he says is necessarily a mere *dictum*. In *Cohens vs. Virginia*, (1821), 6 Wheaton, 264, *Mr. Chief Justice Marshall* well said (at pp. 399–400):

"The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the Court in the case of *Marbury vs. Madison*. It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. In the case of *Marbury vs. Madison*, the single question before the court, so far as this case can be applied to this, was whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The Court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the Court in support of this decision, some expressions are used which go far beyond it."

Mr. Justice Gray, in *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, 679, approved the above, and *Mr. Chief Justice*

Fuller, in his dissenting opinion, concurred in by *Mr. Justice Harlan* (p. 724), conceded its force.

It is also significant that in *Dunbar vs. United States* (1895), 156 U. S., 185, although *Mr. Justice Brewer* cites *United States vs. Claflin*, 13 Blatch., 178, in support of the manner of describing opium (p. 191), yet he does not use the definition in determining the validity of an indictment drawn under Sec. 2865, Rev. Stat., but cites (p. 193) Bouvier, vol. 2, p. 528, and Bouvier cites Bacon, and Bacon defines smuggling as heretofore set out (*ante* pp. 11–12). Nor is it to be forgotten that the opinion referred to is that of a single judge at *nisi prius*

IV.

Rulings of Court Assigned for Error as to Smuggling Defined in the Anti-moiety Act.

(1.) If, contrary to our contention, the Court adopt the definition contained in the Anti-moiety Act, then the following eight (8) elements must co-exist to constitute a violation of Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., to wit: (*a*) An *act* of getting goods into the United States without passing them through the custom-house; *or*, an *act* of getting goods into the United States without submitting them to the officers of the revenue for examination; (*b*) goods, wares or merchandise; (*c*) which should have been invoiced; (*d*) and as to which the invoice is omitted; (*e*) goods, etc., subject to duty; (*f*) the duty not being paid; (*g*) done knowingly and willfully, and (*h*) all with intent to defraud the revenue of the United States. No obligation arises to pay duty until after the vessel has come into port with intent to land. The *act*, therefore, necessarily refers to an *overt act* after an obligation has arisen to pay duty.— ***Post pp. 42-48.***

(2.) Obtaining diamonds in Europe with the intention of getting them into America without passing them through the custom-house, and without submitting them to an officer of the revenue for examination, placing them in a state-room on a steamship at Liverpool, omitting them from the steamship's manifest, steaming the ship into the high seas, steaming the ship into the port of Philadelphia with intent to land them, accompanied with an intention not to pass them through the custom-house and not to submit them to an officer of the revenue for examination, and a demand for the diamonds by a revenue officer who did not make himself known as such, a refusal to deliver them to the revenue officer without an order, a failure to produce an order, and only delivering them to the revenue officer after the revenue officer had made himself known and had been identified as such and then delivering them to him in his official capacity, does not constitute an *act* of getting the diamonds into the United States without passing them through the custom-house, or submitting them to an officer of the revenue for examination. A demand by a revenue officer, as such, for said diamonds and a delivery thereof to him, as such, do not constitute an *act* of getting diamonds into the United States without passing them through the custom-house or submitting them to an officer of the revenue for examination.—*Post pp. 48-51.*

(3.) The Act of June 1, 1872 (17 Stat., 196, 198), now Sec. 1035, Rev. Stat., only permits a verdict of guilty of an attempt when the attempt is itself a separate offense. The statutes of the United States have never made an attempt to smuggle a separate offense.—*Post, pp. 51-52.*

(4.) The interpreting clause contained in the proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), makes smuggling for the purposes of that act either

(*a*) an act of smuggling actually completed, or (*b*) an overt act of an attempt to smuggle. This gives the word smuggle an unnatural meaning not in accordance with the common understanding of the word and contrary to the rules of grammar. The interpreting clause furnishes a rule for the interpretation of this statute, but not for the interpretation of the indictment. It, therefore, follows that an indictment for smuggling is not an indictment for attempt to smuggle, and an attempt to smuggle not being made a separate offense, there could be no conviction for an attempt to smuggle under said indictment.—*Post, pp. 52-54.*

(5.) An attempt is an overt act of the same character as an act which would constitute a completed offense if not interrupted before its completion. An intent is not an overt act of attempt, and overt acts of preparation with intent do not constitute overt acts of attempt.—*Post, pp. 59-62.*

(6.) The facts set forth in paragraph (2), above, do not constitute more than overt acts of preparation with an intent, and do not constitute overt acts of an attempt to smuggle.—*Post, pp. 54-67.*

(*a.*) *The facts and the evidence.*

The evidence bearing on this question has already been set out (*ante* pp. 16–20), and will not be repeated.

(*b.*) *The rulings of the Court.*

Mr. Herman Keck, plaintiff in error, requested the Court to give to the jury the following binding instruction (record, p. 110), to wit:

"The jury are instructed that there is insufficient evidence introduced into this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on both bills of indictment."

This was refused by the Court, and an exception taken (record, p. 112), and was assigned as number ten in the assignments of error (record, p. 116).

Mr. Herman Keck, plaintiff in error, requested the Court to give to the jury the following binding instruction (record, p. 110), to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of each Bill of Indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of both Bills of Indictment."

This was refused by the Court, and an exception taken (record, p. 112), and was assigned as number twelve in the assignments of error (record, p. 116), and in the petition for a writ of error (record, p. 119).

The Court, in its charge, said to the jury (record, p. 112):

"*Gentlemen of the Jury*—The several statutory provisions under which the defendant is indicted have been read to you, and are doubtless understood. I need not undertake to explain them or to dwell upon the law governing the case. *It is sufficient to say in this respect, that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged.*"

To the following part of the foregoing language an exception was noted (record, p. 113), to wit:

"It is sufficient to say in this respect that *if the statements made here under oath by Captain Loesewitz* respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

This constitutes assignment of error number seventeen (record, p. 118).

Assignment number sixteen in the assignments of error (record, pp. 117–118), refers to the answer of the Court to the request for special instruction number ten. The Court said (record, p. 112), to wit:

"The Court affirms the tenth point generally, but the meaning ascribed to it by the Court is that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the *smuggling* charged, *as testified to by Captain Loesewitz;* and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

An exception was taken to this answer of the Court (record, p. 112), and the ruling of the Court was assigned as number sixteen in the assignments of error (record, pp. 117–118).

Mr. Herman Keck, plaintiff in error, requested the Court to give to the jury the following special instruction (record, pp. 110–111), to wit:

"No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same, or putting the same on his manifest, and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling, or clandestinely introducing, or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

This was refused by the Court, and an exception taken (record, p. 112), and was assigned as number thirteen in the assignments of error (record, pp. 117–118) and in the petition for a writ of error (record, p. 119).

(*c.*) *Rules governing application of criminal statutes to facts.*

What we have heretofore said on this subject applies equally to the question under discussion, and without repeating it the Court is referred thereto (*ante*, pp. 21–25).

(*d.*) *The question divided for discussion.*

If the Court determine that the definition contained in the Anti-moiety Act applies, then the rulings of the Court are erroneous for the following reasons, to wit:

(1.) The facts do not make out a case of smuggling, as defined in the Anti-moiety Act.

(2.) The testimony of Captain Loesewitz does not make out a case of smuggling, as defined in the Anti-moiety Act.

(3.) There is no statute punishing an attempt to smuggle, as defined in the Anti-moiety Act.

(4.) The indictment does not charge an attempt to smuggle.

(5.) The facts do not make out a case of attempt to smuggle.

(6.) The testimony of Captain Loesewitz does not make out a case of attempt to smuggle.

(*e.*) (*1.*) *The facts do not make out a case of smuggling as defined in the Anti-moiety Act.*

Even if it were proper to give the word "smuggle" in the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., the definition contained in the proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), the evidence does not make out an offense, because there was *no act* of passing the diamonds into the United States without passing them through the custom-house, or passing them into the United States without submitting them to the officer of the revenue for examination. The Anti-moiety Act specifies that it is "*the act*" of getting goods past the custom-house without passing them through the custom-house; or "*the*

act" of getting the goods past the officer of the revenue without submitting them to him for examination. The evidence shows no such "*act*."

To give the Anti-moiety Act the construction contended for, it would be necessary to read it without the words, "*acts with*," and it would read "smuggling shall be construed to mean the intent to defraud," instead of "*the act* with intent to defraud," etc. To give it such an interpretation would violate all the rules of interpretation to which we have already referred. (See authorities, *ante*, pp. 8–9; pp. 21–25; pp. 29–34.)

In order to constitute the crime of smuggling under Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), Sec. 2865, Rev. Stat., the following elements must co-exist:

(1.) Smuggling and clandestinely introducing into the United States.

(2.) Goods, wares, or merchandise,

(3.) Which should have been invoiced,

(4.) And as to which the invoice is omitted,

(5.) Goods, etc., subject to duty,

(6.) The duty not being paid,

(7.) Done knowingly and willfully,

(8.) All with intent to defraud the revenue of the United States.

If we adopt the definition contained in the proviso to Section 4 of the Anti-moiety Act, the following elements must co-exist:

(1.) An *act* of getting goods into the United States without passing them through the custom-house:

Or,

An *act* of getting goods into the United States without submitting them to the officers of the revenue for examination.

(2.) Goods, wares, or merchandise,

(3.) Which should have been invoiced,

(4.) And as to which the invoice is omitted,

(5.) Goods, etc., subject to duty,

(6.) The duty not being paid,

(7.) Done knowingly and willfully,

(8.) All with intent to defraud the revenue of the United States.

The Act of Aug. 30, 1842 (5 Stat., 548, 565), thus interpreted, punishes either an *act* of getting goods into the United States without passing them through the custom-house *without paying the duty;* or an *act* of getting goods into the United States without submitting them to the officers of the revenue for examination *without paying the duty.* The *acts,* therefore, refer to overt acts committed after the obligation has arisen to pay the duty. This obligation *to pay the duty* does not arise until after the vessel arrives within the port of entry with intent to land; *United States vs. Vowell* (1809), 5 Cranch, 368; *Arnold vs. United States* (1815), 9 Cranch, 104, 120; *Hartranft vs. Oliver* (1888), 125 U. S., 525, 528; *Sherman vs. Robertson* (1889), 136 U. S., 570; *Saltonstall vs. Russell* (1894), 152 U. S. 628, 631; *Seeberger vs. Schweyer* (1894), 153 U. S., 609.

In *United States vs. Vowell* (1809), 5 Cranch, 368, *Mr. Chief Justice Marshall* said (p. 372) that:

"The distinction taken by the counsel for the defendants in error, between a district and a port of entry, is correct. *The duties did not accrue, in the fiscal sense of the term, until the vessel arrived at the port of entry.* If the question had been doubtful, the Court would have respected the uniform construction which it is understood has been given by the Treasury Department of the United States upon similar questions. It is understood, that in case of an increase of duty, the United States have always demanded and received the additional duty if the goods have not arrived at the port of entry before the time fixed for the commencement of such additional duty, although the vessel may have arrived within the collection district before that time. The same rule of construction is to be observed when there is a diminution of duty."

In *Arnold vs. United States* (1815), 9 Cranch, 104, *Mr. Justice Storey* said (p. 120):

"It is further contended that the importation was complete by the arrival of the vessel within the jurisdiction limits of the United States on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation *so as to attach the right to duties*, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry. This was expressly decided in the case of the *United States vs. Vowell*, 5 Cranch, 368."

In *Hartranft vs. Oliver* (1888), 125 U. S., 525, *Mr. Justice Field* said (p. 528):

"Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse; and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board of a ship, in charge of a custom-house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. So far as the Government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of those places, they cannot be removed without a permit from the collector. When on ship board in charge of a custom-house inspector, they are in the same condition, and cannot be removed without a like permit. By statute, collectors are required to put one or more inspectors on board of every vessel immediately on her coming within a collection district; and no merchandise can be unloaded or removed from the vessel without a permit in writing from the collector. Rev. Stat., Sections 2875, 2876."

The same rule was laid down in *Sherman vs. Robertson* (1889), 136 U. S., 570, 571; *Saltonstall vs. Russell* (1894), 152 U. S., 628, 631; *Seeberger vs. Schweyer* (1894), 153 U. S., 609, 611, 613; and many other cases.

Carr in his commentary on "Judicial Interpretation of the Tariff Acts" (1894), 44-45, states the rule thus:

"SEC. 97. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry."

Following out the regular course in shipping merchandise to America, the following may be noted: The invoice is taken to the American Consul at the place where the merchandise is purchased, and is duly certified to by the Consul. Act of June 10, 1890 (26 Stat., 131). An omission to get a consular invoice is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without paying the duty*. The next step is to put the goods on board the ship. That is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without paying the duty*. The next step is for the captain of the vessel to put the goods on the manifest. Rev. Stat., Sec. 2806. An omission so to do is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without paying the duty*, but is a distinct offense of omitting goods from the manifest. Rev. Stat., Sec. 2809. The next step is to steam or sail the vessel from the port of departure into the high seas. That is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without paying the duty*. The next step is to steam or sail the vessel into port. *It is not until after the vessel comes within the port that an obligation arises to pay duty. United States vs. Vowell* (1809), 5 Cranch., 368; *Arnold vs. United States* (1815), 9 Cranch., 104, 120; *Hartranft vs. Oliver* (1888), 125 U. S., 523, 528; *Sherman vs. Robertson* (1889), 136 U. S., 570; *Saltonstall vs. Russell*

(1894), 152 U. S., 628, 631; *Seeberger vs. Schweyer* (1894), 153 U. S., 609; Carr on Judicial Interpretation of the Tariff Act, Sec. 97, pp. 44–45. The goods on board the ship in port are, within the meaning of the law, in the custody of the custom-house officer. *Mr. Justice Field*, in *Hartranft vs. Oliver* (1888), 125 U. S., 525, 528. A port is an entity. Therefore, bringing the ship into port is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without* paying the duty. Bringing into port must necessarily *precede* the *act* of passing the goods through the custom-house, and *precede* the *act* of submitting goods to the officers of the revenue for examination. If the importation were wrongful, it constitutes the crime of importing and bringing in contrary to law. Rev. Stat., Sec. 3082. The next step is to produce the manifest. Rev. Stat., Secs. 2811 and 2812. An omission to produce the manifest is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without paying the duty*, but a distinct offense under Rev. Stat., Sec. 2814. The goods cannot be removed without the consent of the Custom-house Inspector. *Mr. Justice Field*, in *Hartranft vs. Oli-* (1888), 125 U. S., 525, 528. It is now that a person might take the goods from the vessel into the United States by passing them through the custom-house or submitting them to the officers of the revenue for examination, and an *act* of taking the goods into the United States *without* passing the same through the custom-house or submitting them to the officers of the revenue for examination without paying the duty would constitute smuggling within the meaning of the proviso of Section 4 of the Anti-moiety Act of June 22, 1874, as a violation of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., if this Court hold that that definition applies, contrary to our contention (*ante*, pp. 28–39).

Upon the arrival of the steamer Rhynland within the port of entry of Philadelphia, the vessel and its cargo were in the custody of the custom-house officials. Nothing was done. There was no overt act after the constructive possession of the cargo by the custom-house officials, after the importation was complete, *after the obligation to pay duties accrued*, the diamonds having been seized by Revenue Officer Gallen before any overt acts were thereafter committed. And this is true, whether we take the story as detailed by Captain Frank Loesewitz (record, p. 27; *ante*, pp. 17–18), or that of Revenue Officer Gallen (record, pp. 43–45; *ante*, pp. 18–19), or of Special Treasury Agent Cumings (record, p. 59; *ante*, p. 19), for in either case Captain Loesewitz delivered the diamonds on board the steamer Rhynland to Revenue Officer Gallen, whom he knew to be such at the time of the delivery.

According to the testimony of Treasury Agent John C. Gallen (record, pp. 43–45; *ante*, pp. 18–19) there was no *act* of bringing the diamonds from aboard the ship Rhynland into the United States without passing the diamonds through the custom house, and there was no *act* of bringing the diamonds from aboard the ship Rhynland into the United States without submitting the same to the officers of the revenue for examination. According to Mr. Gallen's evidence (*ante*, p. 18), Gallen on board the ship asked Captain Loesewitz if he had a package for certain named persons, and he said he had a package for Van Reeth, and said he would give up the package to Gallen if he had an order for it. Gallen said that he did have an order. Captain Loesewitz said, "show me the order and I will go and get the package." Gallen replied, "I would like to *see* the package *before delivering the order*." Gallen followed the Captain down to his room, which the Captain entered, and emerged with the package in his hand. Loesewitz said, "*Where is your order?*" Gallen testified, "I produced my card as United States Treasury Agent. He refused to let me have it until I was identified as a custom-

house officer." A young man then identified Gallen as a custom-house officer, and Gallen testified that the young man "*advised the Captain to give the package to me, which the Captain did.*" Gallen was asked if he told Captain Loesewitz by what authority he took the diamonds, and replied: "*Yes, sir; I told him I was United States Treasury Agent and this package containing diamonds was not on the manifest.*"

It is, therefore, very apparent from the evidence that the production of an order, signed by the consignee, was a *condition precedent* to the delivery of the diamonds to Gallen. Gallen, as an impersonated agent, never did obtain the diamonds in that character to take them from ship-board into the United States. He never did produce either a genuine or fictitious order, which was the *condition precedent* to the delivery of the diamonds to Gallen as a *carrier* to take the diamonds from ship-board into the United States. Not producing an order, either genuine or fictitious, Captain Loesewitz declined to give up the package. Gallen then produced his card as a United States Treasury Agent, and Loesewitz consented to deliver up the package if Gallen identified himself as such. A young man connected with the steamship company thereupon identified Gallen, and Loesewitz gave up the package. Gallen testified that he told Loesewitz that he took the package by virtue of his office as United States Treasury Agent, because the package was not on the manifest. It follows, therefore, that there was no *act* of bringing the diamonds from aboard ship into the United States without passing the same through the custom-house; and without passing the duty; that there was no *act* of bringing the diamonds from aboard ship into the United States without submitting the same to the officers of the revenue for examination without paying the duty; on the contrary, they were submitted to Gallen when he made the fact known that he was an officer of the revenue.

Special Treasury Agent James C. Cummings testified more

briefly *to a part of the conversation* between Gallen and Loesewitz, substantially as testified to by Gallen (*ante*, p. 19).

Captain Loesewitz testified that they came to his chart-room, and they said they were treasury agents, and wanted the package, and he gave it up to them (*ante*, pp. 17–18). He further testified that he had been in the habit of bringing over small packages in the same way he had brought this package, and that after the vessel had been docked he would go to a customs' officer on the dock and report the fact, and that in this case he had not had time to go on the dock, as the treasury agents came aboard before he had time to go upon the dock (record pp. 36–37; *ante*, pp. 17–18).

As there was no act within the meaning of smuggling as therein given it, it therefore follows that assignment of error number ten (*ante*, pp. 39–40) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the bill of indictment. The third count of the bill of indictment had been disposed of when the Court gave instruction number seven to find the defendant not guilty thereon (record, p. 111), and the first count is clearly bad, as has been heretofore presented in our former briefs (Original Brief, pp. 22–25; Revised Brief, pp. 23–26. *Brief in Reply, pp. 1–12*).

It also follows that assignment number twelve (*ante*, p. 40) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the second count of the bill of indictment, which is the count charging the defendant with smuggling.

(*e.*) (*2.*) *The testimony of Captain Loesewitz does not make out a case of smuggling as defined in the Anti-moiety Act.*

This proposition was necessarily involved in the discussion of the preceding proposition (*ante*, pp. 42–50), and it will not be repeated. In addition we add that according to the testimony of Captain Loesewitz, he did the very thing which the law requires — namely, "submitted them to the officers of the revenue for examination." (*Ante*, p. 49.)

It, therefore, follows that assignment of error number seventeen (*ante*, p. 40) is well taken, because the Court instructed the jury to find the defendant guilty if they believed "*the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here.*"

It also follows that assignment of error number sixteen (*ante*, pp. 40–41) is well taken, because the Court, in response to a request for a special instruction, told the jury that they must find the defendant guilty if they found the defendant guilty "*of the smuggling charged as testified to by Captain Loesewitz.*

(*e.*) (3.) *There is no statute punishing an attempt to smuggle as defined in the Anti-moiety Act.*

The Act of June 1, 1872 (17 Stat., 196, 198), provided, among other things, as follows, to wit:

"SEC. 9. That in all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, *or may be found guilty of an attempt* to commit the offense so charged; *provided, that such attempt be itself a separate offense.*"

This was incorporated as Sec. 1035, Rev. Stat. It will be noted that by this act that a person "*may be found guilty of an attempt * * * provided, that such attempt be itself a separate offense.*"

Nowhere in the statutes of the United States is an attempt made a separate offense. This is a criminal statute and cannot be extended by construction. (See authorities, *ante*, pp. 21–25.) The plain language of a statute must be followed (see authorities, *ante*, pp. 8–9). The Anti-moiety Act does not undertake to punish smuggling and this indictment is not drawn thereunder, but is based on Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat.

As to some crimes, attempts are made substantive offenses, such as attempts to commit the crime of murder or manslaughter, as under Section 5342 of the Rev. Stat. In some States general statutes have been passed, permitting a conviction for an attempt under an indictment for doing the act. But there are no Federal statutes of that kind, and none in reference to the crime of smuggling. The only place the word attempt is used in reference to smuggling is in the interpreting clause in proviso to Section 4 of the Anti-moiety Act. (See *ante* pp. 28–37.) It is nowhere made a "separate offense."

(*e.*) (*4.*) *The indictment does not charge an attempt to smuggle.*

If it be held, contrary to our contention (*ante*, pp. 28–37) that the definition in the Anti-moiety Act applies, the indictment does not charge an attempt to smuggle. As we have already stated, the proviso in Sec. 4 of the Anti-moiety Act, is an interpreting clause (*ante*, pp. 29–30).

The following is laid down in Sutherland on Stat. Con. (1891), 307:

"It was enacted that in construing statutes the words 'spirituous liquors' should be taken to include intoxicating liquors, and all mixed liquors, any part of which is spirituous or intoxicating. Under an indictment charging the selling of spirituous liquors, it was held error to admit proof of selling any liquor which was not such in fact, independently of the statutory definition; *that the statute furnished a guide for the construction of the statute, not the indictment.*"

Black on Interpretation of Laws (1896), 195, lays the rule down as follows, to wit:

"A legislative definition in a statute does not govern in an indictment. The construction of the statutes is governed by legislative definitions, that of indictments is governed entirely by the ordinary use of language."

In *State vs. Adams* (1872), 51 N. H., 568, defendants were indicted for being "common sellers of spirituous liquors."

The State offered evidence that defendants were "common sellers of ale, porter, and cider; and that these liquors contained from four to ten per cent of alcohol, which could be separated from them merely by distillation;" to this evidence the defendant excepted, and the case was reserved. The general statutes of New Hampshire provided that the words "spirituous liquor" should be taken to include intoxicating liquor, and all mixed liquor, any part of which is spirituous or intoxicating. The defendants did not contend that ale, porter, and cider are not intoxicating liquors, or that the sale of those liquors is not prohibited by statute, but that the indictment did not charge them with selling that description of liquors, and hence that no evidence of sales of ale, porter, and cider is admissible under this indictment.

Mr. Justice Smith said (pp. 569–570) that:

"This objection is well taken. The indictment charges sales of spirituous liquors only. * * * The legislature have enacted that, in construing statutes, the words 'spirituous liquor' shall be taken to include intoxicating liquor, and all mixed liquor, any part of which is spirituous or intoxicating. * * But this rule for the construction of statutes cannot govern in construing this indictment."

It is repugnant to charge a person with *having done* an act and in the same breath to say he *attempted* to do it. The interpreting clause in the proviso to section 4 of the Antimoiety Act gives an unnatural import to the word smuggle. It, as we have already stated (*ante*, p. 42), provides that smuggling is the *act* of bringing goods into the United States without passing them through the custom-house without paying the duty, or the *act* of bringing goods into the United States without submitting them to the officers of the revenue without paying the duty, as well as the *act* of *attempting* to bring goods into the United States without passing the same through the custom-house without paying the duty, or the *act* of *attempting* to bring goods into the United States, with-

out submitting them to the officers of the revenue for examination, without paying the duty. This statute merely defines the word smuggling and furnishes a rule for the interpretation of the word smuggle, as found in the Anti-moiety Act, and which interpreting clause it is sought to extend as an interpreting clause to Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565). It furnishes no rule for the interpretation of an indictment, and does not purport to make an attempt to smuggle a distinct offense, punishable by a fine or imprisonment or both. The indictment charges smuggling and does not charge an attempt to smuggle, and the interpreting clause furnishes no rule for the interpretation of the indictment. The Act of June 1, 1872 (17 Stat., 196, 198), now Sec. 1035, Rev. Stat., only permits the jury to find a defendant guilty of an attempt to commit the offense charged, *provided such attempt be itself a separate offense.*

To charge a person in an indictment with smuggling is to charge him with the completed act. The interpreting clause furnishes no rule for the interpretation of the indictment. To charge a person with an attempt to smuggle is to charge him with an interrupted overt act, which, if completed, constituted the offense. The interpreting clause furnishes no rule for the interpretation of the indictment. In either case in law, as declared by the interpreting clause, it is the one crime of smuggling, although logically and grammatically and according to the ordinary use of language one is inconsistent with and contradicts the other. The indictment did not charge an attempt, and an attempt is not made a separate offense. It, therefore, follows that the question of an attempt is not presented on the record.

(*c.*) (5.) *The facts do not make out a case of attempt to smuggle.*

In this case there was a mere unexecuted intention to make an attempt to smuggle; or, at most, a preparation,

accompanied with an intention to make an attempt to smuggle. The acts of preparation were, first, an omission of a consular invoice, which would be one step in the preparation; carrying the diamonds to the ship at Liverpool, which would be a second step in the preparation; carrying the diamonds aboard the ship at Liverpool, which would be a third step in the preparation; carrying the diamonds to the state-room at Liverpool, which would be a fourth step in the preparation; putting the diamonds in a drawer in the state-room at Liverpool, which would be a fifth step in the preparation; omitting the diamonds from the manifest, which would be a sixth step in the preparation; steaming the vessel into the high seas, which would be a seventh step in the preparation; steaming the ship into the port of Philadelphia, which would be the eighth step in the preparation; omitting to deliver a manifest containing the diamonds, which would be a ninth step in the preparation. There was no *overt act* thereafter to land the diamonds; no *overt act* to bring into the United States without passing the same through the custom-house; no *overt act* of bringing into the United States without submitting the diamonds to the revenue officers for examination, *and the only overt acts were overt acts of preparation.* Revenue Officer Gallen testified (*ante*, pp. 18–19) that he went to the chart-room, and asked if there were a package for certain-named persons, and that Captain Loesewitz replied: "I have a package for Van Reeth, of 21 West Fourth Street, Cincinnati, Ohio, *and I will give it to you if you have an order for it.*" Gallen said, as testified to by him, "*Captain, I have an order for them.*" Loesewitz said, "*Show me the order and I will get the package.*" Gallen testified that he replied, "Captain, I would like to *see* the package *first, before delivering the order.*" Gallen testified that Captain Loesewitz went to his room, and that he (Gallen) followed him there; and that Captain Loesewitz, just as he came from his room with a package in his hand, he (Gallen) said, "Captain, that is the package I want."

Loesewitz replied, "*Where is your order?*" The following *then* took place, as testified to by Gallen: "*I produced my card as United States Treasury Agent. He refused to let me have it until I was identified as a custom-house officer.*" Upon Gallen being identified as a customs officer, Loesewitz handed the package to Gallen.

Gallen was asked: "*Did you tell him by what authority?*" and Gallen answered, "*Yes, sir; I told him I was United States Treasury Agent; and this package, containing diamonds, was not on the manifest.*" It is, therefore, apparent from this evidence that Loesewitz did not start with the package of diamonds to take them into the United States without passing them through the custom-house, or without submitting them to the officers of the revenue for examination. It is an *act* of that character which is denominated smuggling in the interpreting clause forming proviso to Sec. 4 of the Anti-moiety Act, and an attempt to do an *act* of that character which is also denominated smuggling. The production of an order, genuine or fictitious, was made *a condition precedent* to a delivery of the diamonds to Gallen as a *carrier* to do the *act* of taking the diamonds into the United States without passing the same through the custom-house or submitting them to an officer of the revenue for examination. Although the intent to smuggle might exist, and although the intent to make Gallen the carrier to do the *act* of taking the diamonds into the United States without passing them through the custom-house or submitting them to the officers of the revenue for examination. *But as a matter of fact he did not make Gallen his carrier, and would not and did not intend to make Gallen his carrier unless Gallen should perform the condition precedent — to wit,* produce an order. If Gallen, as a detective, had produced a fictitious order, and Loesewitz, relying thereon, had delivered the package to Gallen, and Gallen had done the *act* of one step in the *act* of taking the diamonds into the United States without passing them through the custom-

house, then there would have been an overt act of an attempt to take the diamonds into the United States without passing them through the custom-house or submitted them to an officer of the revenue for examination. But no such state of facts appears in the record; and when Captain Loesewitz went to his room and took the package in his own hands and held it there, and declined to give it up until there was performed the promise of producing an order, there was merely a tenth step in the preparation, and *it was but another overt act of preparation, and not an overt act* of smuggling interrupted. When Loesewitz did deliver up the package to Gallen, it was after Loesewitz had asked Gallen, "*Where is your order?*" (*ante*, p. 18), and *after* Gallen had produced his card as United States Treasury Agent, and after he (Gallen) had been identified as such. So that when the diamonds were handed to Mr. Gallen, they were handed to him in his capacity of a United States Treasury Agent (*ante*, p. 18), and Loesewitz did the very thing which the statute said to do was *not* smuggling.

Witness James C. Cummings, Special Treasury Agent, testifies to but a part of the conversation (*ante*, p. 19), and the part testified to is substantially the same as testified to by Gallen.

Merely because there was the crime of failing to get a consular invoice, or of omitting goods from the manifest, or of failing to deliver the manifest, or because the acts testified to may have constituted an unlawful importation under the provisions of Section 4 of the Act of July 14, 1866 (14 Stat., 178, 179), now Sec. 3082, Rev. Stat., and merely because in this case there could be no conviction of importing contrary to law, because the first count of the indictment was fatally defective (Original Brief, pp. 22–25; Revised Brief, pp. 23–26; *Brief in Reply, pp. 1–12*) would not authorize a conviction for an attempt to smuggle when, by the over-zeal of a treasury official, no overt act toward landing the diamonds was done.

There is a wide distinction between an attempt and an intent; and there is a wider distinction between the acts constituting an attempt and acts constituting preparation. The proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186; *ante*, p. 29), defines smuggling for the purposes of that act. This intepreting clause to the Anti-moiety Act *for the purposes of that act* is the only Federal statute which makes any reference to "an attempt to smuggle," and if it be proper to consider the matter of an attempt, we must look to that law. We have already shown (*ante*, pp. 54–57) that at most there were mere overt acts of preparation to make an attempt to smuggle without any overt act of an attempt; an unexecuted intention, and no overt act done beyond the acts of preparation. An attempt is an *interrupted overt act* done *after* all acts of preparation were fully completed, and which interrupted *overt act* has failed to bring about the result which would have given it the character of the principal crime if it had not been interrupted. An *overt act*, which would have been of the character of the principal crime, would have taken place had Gallen procured the diamonds on a fictitious order and started with this package in his possession toward the land to carry out an intent of Loesewitz not to pass the diamonds through the custom-house or not to submit them to an officer of the revenue for examination. But, on the facts presented, there was no *carrier*, and *Captain Loesewitz did not intend that there should be a carrier until the performance of a condition precedent; namely, the production of an order, purporting to come from Keck or the consignee* (*ante*, pp. 18–19).

There was no moving of the diamonds from the state-room toward the United States, where the custom-house is located, interrupted before reaching the land. All preparations had been completed, either to bring them in lawfully by passing them through the custom-house or submitting them to the officers of the revenue for examination, on the one hand, or

of attempting to pass them from the state-room to the land without passing them through the custom-house, or submitting them to the officers of the revenue for examination, on the other hand. No overt act had yet been done, no matter how many acts of preparation or what the secret intention.

The foregoing propositions are fully sustained by the authorities. The following is laid down in Holmes' Common Law (1885), 65, that:

"There is another class of cases in which intent plays an important part, for quite different reasons from those which have been offered to account for the law of malicious mischief. The most obvious examples of this class are criminal attempts. Attempt and intent, of course, are two distinct things. Intent to commit a crime is not itself criminal. There is no law against a man's intending to commit a murder the day after to-morrow. The law only deals with conduct. An attempt is an overt act. It differs from the attempted crime in this, that *the act has failed to bring about the result which would have given it the character of the principal crime.*"

In the case of *People vs. Murray* (1859), 14 Cal., 159, *Mr. Chief Justice Field* (at p. 159), laid down the following proposition:

"Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made."

So in the case on trial it is clear that all the means and measures for the commission of the offense were completed, and preparations made, but there was no direct movement toward the commission after the preparations were complete.

The case of *Mulligan vs. People*, 5 Parker's Criminal Reports, 105, decided by the General Term of the Supreme Court of New York in February, 1861 (Clerke, Sutherland, and Allen, Justices), is an interesting one as illustrating the difference between overt acts of preparation and overt acts of at-

tempt after the acts of preparation. It appears that William Mulligan became involved in a row in a gambling house. Upon being threatened with eviction, drew and pointed an uncocked Colt's revolver at the officer and threatened to shoot. There was no evidence of an attempt to cock the pistol or to pull the trigger. He was prosecuted under the statute which punished every person who should be convicted of shooting at another, or attempting to discharge any kind of fire-arms, with intent to kill, maim, etc. (page 109). At the close of the evidence the Court was requested to charge the jury that the pointing of an uncocked Colt's revolver at a person is not an attempt to discharge the weapon. The Court refused the request, and the ruling of the Court was assigned for error. *Justice Allen*, who delivered the opinion of the Court, said (page 109) that:

"The question presented is, whether a conviction can be had for an attempt to discharge a pistol when the individual indicted has proceeded no further toward an actual discharge of shooting than to raise and point the pistol, uncocked, at the party threatened. There was no evidence of an attempt to cock the pistol, or to pull the trigger, and the jury would have been warranted in finding that the prisoner merely raised the pistol and pointed it at the officer, making the qualified threat before stated. The instruction was properly asked for upon the evidence. *The threat constituted no part of the attempt to discharge the pistol, and was only evidence of the intention of the prisoner.*"

The Court further stated (page 111):

"It is not an attempt to discharge a loaded gun or pistol to put oneself in a situation in connection with the gun or pistol that it may be discharged. A mere getting it in readiness to discharge is not an attempt to discharge it. Upon the trial, an assault with intent to kill was confounded with the specific, statutory, and entirely different offense charged, an attempt to discharge a loaded pistol with the like intent. The act, the attempt to commit which was made an offense, was the discharge of fire-arms. No matter what other offense was committed against the laws, or the person of the officer, if this

offense was not committed, the prisoner was wrongfully convicted. It is far from certain that any offense was committed by the prisoner, but of that we are not the judges. We are only to decide upon the present conviction."

The Court again said (at p. 112):

"An attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution of the ultimate design (Bouvier's Law Dic.). Loading a pistol would be a preparation to shoot, but not an attempt to discharge. So, to get possession of a pistol, to take it from the pocket, and to point it, would be a preparation to discharge it, but not an attempt to discharge it. It may not always be easy to determine where the line is which separates a preparation to perform a given act from an attempt to perform the act. But the act, which is characterized as an attempt, must be proximate to the principal thing to be accomplished, a means to the end, and the pointing of a pistol uncocked is not an attempt to discharge it, punishable under the statute. Fire-arms are usually discharged by drawing a trigger, but they may be discharged in any way by which the powder can be ignited and made to explode, and the attempts to discharge may be as diversified as the means of discharge are various, but can only be by some act which, carried out and perfected, will result in a discharge."

In the case at bar the question is, whether Mr. Herman Keck, plaintiff in error, has done an overt act by attempting to smuggle in violation of Sec. 19 of the Act of Aug. 40, 1842 (5 Stat., 540, 565), now Sec. 2865, Rev. Stat., and not whether he did or attempted to violate any other provision of law. *Mr. Chief Justice Field* (at p. 159), in *People vs. Murray* (1859), 14 Cal., 159.

In *Kelly vs. Commonwealth*, 1 Grant Cases (S. C. Pa.), 484, the defendant was indicted for killing in an attempt to commit rape. The evidence disclosed the killing of a man, and no overt act of force toward the commission of a criminal assault upon his daughter. The Court held that the facts did not make a case for an attempt to commit rape, reversed the conviction because "acts are necessary to constitute an attempt; and an attempt to commit a rape is an ineffectual offer by force to have carnal connection."

It is laid down in *State vs. Wilson* (1862), 30 Conn., 500, that the overt act charged as constituting the attempt must be such as is in itself adapted to produce the effect intended. In the case at bar such overt act would have consisted in Gallen having gotten the diamonds by a fictitious order, and moving them toward land with the intention of not passing them through the custom-house or submitting them to the revenue officers for examination. But no such overt act was done or attempted to be done, or interrupted, and, therefore, there was no attempt.

It, therefore, follows that assignment of error number ten (*ante*, pp. 39–40) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the bill of indictment. The third count of the bill of indictment had been disposed of when the Court gave instruction number seven to find the defendant not guilty thereon (record, p. 111), and the first count is clearly bad, as has been heretofore presented in our former briefs. (Original Brief, pp. 22–25; Revised Brief, pp. 23–26; *Brief in Reply, pp. 1–12.*)

It also follows that assignment number twelve (*ante*, p. 40) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the second count of the bill of indictment, which is the count charging the defendant with smuggling.

(*e.*) (*6.*) *The facts do not constitute an attempt to smuggle according to the testimony of Captain Loesewitz.*

After the Rhynland reached the port of Philadelphia, the following took place, as testified to by the witness, Captain Frank Loesewitz (record, p. 27; *ante*, p. 17), to wit:

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were treasury agents; and

said, Captain, that is a package of diamonds you have got, to be sent to Cincinnati, and if I didn't deliver it I would be arrested. After a while I went down in my room and brought the package up and delivered it over to the treasury agents. That's all that happened."

Captain Loesewitz also testified (record, pp. 35–37):

Q. "Have you not been in the habit of bringing packages over for friends?"

A. "I have brought packages over — little presents that I thought weren't valuable; but I never omitted to go to the custom-house officers and ask them if I might pass them on the dock; only things that contained no valuables."

Q. "*Did you go to the custom-house officers in this case before they went to you?*"

A. "*I had just arrived. I wasn't ashore.*"

Q. "The passengers were on the wharf?"

A. "Yes, sir; the passengers were landed."

Q. "You had made out your manifest, had you not?"

A. "The manifest is always made before we land."

Q. "Where do the officers come aboard?"

A. "Alongside the dock. Which officers do you mean."

A. "I mean the custom-house officers."

A. "They come aboard on the river."

Q. "At quarantine?"

A. "Yes, sir."

Q. "How long had they been aboard before you had landed your passengers?"

A. "It may have been half an hour before we landed them or an hour; I don't know exactly."

Q. "At that time the passengers were making declarations of what they had, and swearing to them before the custom-house officers?

A. "Yes, sir; they are always down in the saloon then."

Q. "Making their declarations to the custom officers?"

A. "Yes, sir; but we are not present then."

Q. "Did you permit the custom-house officers to leave that ship and go on the wharf without telling them that you had this package, and ask them whether you could land it?"

A. "The passengers were on land; every one was on land. It wasn't a thing of importance.

Q. "Did you not say that you always did ask them?"

A. "No, sir; I didn't say that."

Q. "I understood you to say it."

A. "*You asked if I brought packages over before, and I said I always went on shore and asked the custom-house officers on the dock.*"

Q. "Why should you not ask the other custom-house officers when they are on board the ship? Why wait until they get off on the wharf?"

A. "Because they never asked before that—little things."

Q. "You have said that when you brought packages over before of no value, that you always asked the custom-house officers if you could land them. Did you not say that?"

A. "Yes, sir; on the dock."

Q. "Why do you wait until you get on the dock?"

A. "Because I didn't ask them before."

Q. "Did you always wait until they get on the dock?"

A. "Yes; when I have something."

Q. "Did you ask them on the dock this time, or wait until they came to you?"

A. "No, sir; I didn't ask anything this time."

Q. "You waited until the officers came to you, did you?"

A. "The officers didn't come to me; Mr. Gallen, the treasury agent, came aboard."

Q. "When he came he came from the wharf, did he not?"

A. "Yes, sir."

Q. "He had been on the vessel before?"

A. "I don't know that."

Q. "You saw the custom-house officers there?"

A. "Yes, sir; they are always on board when we arrive."

Captain Loesewitz also testified (record, pp. 40–41):

Q. "Just before you get into port, state whether or not you are busy?"

A. "Yes, sir."

Q. "On this particular day were you, as a captain, very busy when you came into port?"

A. "Yes, sir. We are always on the bridge until the ship gets landed."

Q. "As a captain you have considerable to do?"

A. "Yes, sir; we always stand on the bridge going up the river."

Q. "What were you doing at the time Mr. Gallen came into your room?"

A. "I was filling my abstract of log."

Q. "That is one of the things that has to be done at the end of a journey?"

A. "Yes, sir."

Q. "After the passengers have been cleared by the custom-house officers the captain can then have the opportunity to speak to them?"

A. "Yes, sir."

Q. "Had all the passengers landed at that time?"

A. "Yes, sir."

Q. "How long before they had all landed?"

A. "May be a half hour."

There was, according to his evidence, no interrupted overt act of bringing in of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no interrupted overt act of an introduction of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no moving of the diamonds from said state-room toward the land, interrupted before reaching the land. All preparations had been completed, either to bring them in lawfully by passing them through the custom house, or submitting them to the officers of the revenue for examination, on the one hand; or, of attempting to pass them from the state-room to the shore without passing them through the custom-house, or submitting them to the officers of the revenue for examination, on the other hand. As provided in the proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), no overt act had yet been done, no matter how many acts of preparation or what the secret intention.

If, after the steamer Rhynland arrived, a stroke of lightning had sunk the ship, it is clear that up to that time there was no smuggling or an attempt to smuggle, although an offense of omitting to have a consular invoice, or omitting to put the goods on the manifest, or importing contrary to law, may have been committed (*ante*, pp. 46–49).

If, after the ship arrived, Captain Loesewitz had changed his mind and concluded either to pass the same through the custom-house, or submit them to the officers of the revenue, or returned them to Europe, it can hardly be claimed that there was smuggling, or an attempt to smuggle. Or if, after the ship had arrived, an officer of the Government should have demanded an examination, and Captain Loesewitz should thereupon submit them to the officer in his official capacity, it is clear that there had been no smuggling, and as yet no overt act of an attempt to smuggle. Or, as in this

case, the diamonds were lying in the cabin, just as they had been put at the port of Liverpool, and no move made toward taking them from the state-room to the land, there could not be smuggling or an attempt to smuggle, as there was no overt act toward bringing in, interrupted while being carried out. On the contrary, upon a revenue officer demanding the diamonds, in his official capacity, the Captain went to the state-room, got the diamonds, and they were submitted to the revenue officer for his examination (*ante*, pp. 62–63). What was done comes within the very language of the proviso to section four of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), as to acts which do *not* constitute smuggling or attempting to smuggle. By the language of the Anti moiety Act, *nonaction* is not an offense, but *an act*. We have already had occasion to comment on this (*ante* pp. 42–43). Nor is it to be forgotten that Captain Frank Loesewitz testified (*ante* pp. 63–64) that he had been in the habit of bringing over small packages in the same way he brought the package in the case or trial, and after the vessel had been docked he would go to a custom officer on the dock and report the fact, but that in this case he had no time to go on the dock, as the Treasury Agents came aboard before he had an opportunity to go upon the dock.

The authorities above cited (*ante* pp. 59–62) are equally applicable to the testimony of Captain Loesewitz as to that of Gallen and Cummings, and, therefore, will not be repeated.

The Court's special attention was called to this matter by request number five (record, pp. 110–11), (*ante*, p. 41) in the following language, to-wit:

"No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain

Loesewitz received said diamonds with the intention of not invoicing the same, or putting the same on his manifest, and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling, or clandestinely introducing, or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

The Court refused to give this instruction, to which ruling an exception was taken (record, p. 112), and the same was assigned as number thirteen in the assignment of errors (record, p. 116), and is set forth in the petition for a writ of error (record, p. 119).

It, therefore, follows that assignment of error number seventeen (*ante*, p. 40) is well taken, because the Court instructed the jury to find the defendant guilty if they believed "*the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here.*"

It also follows that assignment of error number sixteen (*ante*, p. 40–41) is well taken, because the Court, in response to a request for a special instruction, told the jury that they must find the defendant guilty if they find the defendant guilty "*of the smuggling charged as testified to by Captain Loesewitz.*"

It also follows that assignment of error number thirteen (*ante*, p. 41) is well taken, because the Court refused to give special instruction number five, covering the matter of an attempt.

V.

Smuggling is Not Importing Contrary to Law.

(1.) In interpreting the statutes of a government, full force and effect shall be given to each section of said statutes. In order so to do courts will so construe one section as not to defeat, annul, or destroy another, but to explain and support it.—*Post pp. 68-70.*

(2.) Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., punishes smuggling and is necessarily confined to overt acts done after an obligation has arisen to pay duty, and, therefore, after the importation is complete. Sec. 4 of the Act of July 14, 1866 (14 Stat., 178, 179), now Sec. 3082, Rev. Stat., by its terms punishes importing contrary to law. It, therefore, pertains to unlawfulness in matters pertaining to the port and not to overt acts after the importation is complete.—*Post pp. 68-72.*

(3.) Therefore, smuggling is not importing contrary to law, but an offense distinct therefrom and which can only arise after the importation is complete. *Post, pp. 68-72.*

It was contended by the learned Assistant Attorney-General (*Mr. Whitney*) that the goods were imported, and that if imported they were smuggled. This conclusion does not follow. In his brief he asks the question, "Were the goods imported?" and, having argued that the goods were imported, asserts that, therefore, the case is one of smuggling. Smuggling is not the only offense against the revenue laws. Among the long list of offenses against the revenue laws (some of which we have set out, *ante*, pp. 25–26) is the offense known as "*importing*, or bringing in contrary to law." This crime is founded on section four (4) of the Act of July 14,

1866 (14 Stat., 179), now Sec. 3082, Rev. Stat. It is a settled rule of construction that full force and effect is to be given to all the provisions of the law, and, when necessary, general language of one section is to be restricted so as to give full force and effect to the language of other sections. In order, therefore, to give full force and effect to Sec. 3082 and Sec. 2865, violations of the statutes in reference to "*importing*" would be included within and be covered by Section 3082. *Market Co. vs. Hoffman* (1879), 101 U. S., 112, 115–116; *Bernier vs. Bernier* (1893), 147 U. S., 242, 246; *Seymour vs. Ry. Co.* (1886), 44 Ohio St., 12, 19; *Kemper vs. Campbell* (1886), 44 Ohio St., 210.

In one of the cases cited (*Seymour vs. Ry. Co.*, 44 Ohio St., 12) plaintiff sued defendant railway company for killing domestic animals by reason of want of a fence required by statute. The question was whether the action was barred in four or six years. Sec. 4981 of the Rev. Stat. of Ohio placed a six-year limitation on liabilities created by statute. Rev. Stat., Sec. 4982, placed a limitation of four years on all torts. *Johnson, J.*, said (p. 19) that:

"These two sections must be construed together so as to give each force. If we should say that this cause of action came under [Section] 4982, we would be compelled to hold that it was not a liability created by statute, or that both four and six years applied to it; but by holding as we do, that Section 4982 applies to injuries and wrongs to person or property other than those to perform a statutory duty, *we give force and effect to both sections.* This statute requiring railroads to be fenced, and making them liable for damages to personal property by reason of such failure, creates a statutory liability which is barred in six years. While Section 4982 is given full force by limiting it to common-law liabilities for wrongful acts, neglect, or default, such a construction *harmonizes and gives full force to both sections.*"

The same court, in *Kemper vs. Campbell*, 44 Ohio St., 210 (1886), gave full force and effect to both Sections 4133 and 4134 of the Revised Statutes of Ohio, by limiting the word,

"mortgage," in Section 4133, to one which was a mortgage on its face, and limiting the word "incumbrance," contained in Section 4134, to a mortgage which was not such on its face.

In *Bernier vs. Bernier* (1893), 147 U. S., 242, *Mr. Justice Field* said (at p. 246) that:

"It is a general rule, without exception in construing statutes, that effect must be given to all their provisions if such a construction is consistent with the general purposes of the act and the provisions are not necessarily conflicting. *All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it.*"

Applying these rules, the argument of the learned Assistant Attorney-General would be entitled to weight *if* it were intended to show that plaintiff in error, Mr. Herman Keck, was guilty under Section 3082 of "*importing* contrary to law." The first count of the indictment was based on Section 3082, and as we have shown (Original Brief, pp. 22–25; Revised Brief, pp. 23–26; *Brief in Reply, pp. 1–12*), this count is fatally defective, and a conviction cannot be sustained; and if the evidence would sustain a conviction under Section 3082, and the count of the indictment based thereon was fatally defective, a verdict cannot be sustained under Section 2865, which the evidence does not fit.

It is conceded that the word "import" means to bring goods, wares, and merchandise into a port of the United States with intent to land them (*ante*, pp. 44–47), and if it be further conceded that the diamonds charged in the second count of the indictment were brought within the port of Philadelphia with intent to land the same and with the further intent to defraud the revenue of the United States, it does not follow that the defendant is guilty under Sec. 19, of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. Under the Act of March 2, 1799 (1 Stat., 646, Sec. 24), to import goods, wares, and merchandise into the United

States, with no bill of lading, no invoice, and no manifest, with intent to defraud the revenue of the United States was clearly unlawful. But the penalty was forfeiture of the goods and the payment of an amount equal to the value of the goods, and this was the only penalty. It was never contended that such a state of facts constituted smuggling or clandestinely introducing into the United States. In the case of *United States vs. 10,000 Cigars* (1855), 2 Curtis, 436, it appears that cigars were put aboard a vessel in Cuba without a bill of lading, invoice, or manifest, with the intent that the master would smuggle them and deliver them to Mr. Davis at Portland. On the arrival of the vessel the cigars were seized. The question was, whether the goods had been *imported into the United States. This was a case of importing contrary to law*, and the penaltv for this conduct was the forfeiture of the cigars and the payment of an amount equal to their value. It was not until the Act of July 18, 1866 (14 Stat., 179, Sec. 4), now Sec. 3082, Rev. Stat., that a penalty of fine or imprisonment, or both, was imposed for this offense. *Stockwell vs. United States* (1871), 13 Wall., 531, 551-552. When Congress came to pass the Act of February 27, 1877 (19 Stat., 247), restoring Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), as Sec. 2865, Rev. Stat. (*ante*, pp. 6-8), it was easy for Congress, if it intended to punish acts of irregular importing, to have expressly said so. The word "import" had a well-defined meaning, and if Congress intended to punish "importing with intent to defraud the revenues of the United States," it would have used the word "import" instead of the word "smuggle." It is not to be presumed that Congress would pass a law, in 1877, upon a subject which had been legislated upon in 1866, and which appeared in the revision of 1874 as Section 3082, and was in full force and effect in 1877, is still in full force and effect, and on which the fatally defective first count of the indictment is predicated. Congress is not presumed to do a vain thing. Even if it be

conceded that the Government had the right to seize the diamonds and forfeit them to the United States, because imported contrary to law, with intent to defraud the revenue, it does not follow that they were smuggled. At most there was an unexecuted intention to smuggle.

The contentions of the learned Assistant Attorney-General can only be sustained by adopting a rule that there are constructive crimes, that a criminal statute may be construed to cover cases not falling within its term, and that conjecture is to be substituted for interpretation. The following, from Lieber's Hermeneutics, 9, is in point:

"The idea, involved in the term interpretation, that we have to discover the true meaning of signs, and represent it to others, implies, likewise, that we proceed in doing so on safe ground, according to rules established by reason, and not arbitrarily or whimsically. On this account, interpretation, and, as will be seen in the sequel, construction, are distinct from conjecture."

VI.

The Crime of Smuggling was Not Committed, Because the Law Did Not Require an Invoice.

(1.) The offense of smuggling under Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., can only exist as to goods which the law requires to be invoiced.—*Post pp. 73-74.*

(2.) Sec. 4 of the Act of June 10, 1890 (26 Stat., 131), divides goods into two classes, (*a*) those which must be invoiced, and (*b*) those which need not be invoiced. Personal effects accompanying a passenger need not be invoiced.—*Post p. 74.*

(3.) A Captain of a steamship does not cease to be a passenger by being a Captain, and he is not required to invoice goods which, when accompanying any other passenger, it would not be necessary to invoice.—*Post pp. 74-75.*

(4.) **A Captain of a steamship, who procured a package of diamonds in Antwerp, put it in his state-room at Liverpool and steamed his ship into the port of Philadelphia, cannot be guilty of smuggling said diamonds, because the law did not require that they should have been invoiced.—** ***Post pp. 74-75.***

(*a.*) *The elements of the crime.*

The offense of smuggling, for which a punishment is prescribed in Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., consists of eight elements, to wit:

(1.) Smuggling,
(2.) Goods, wares, or merchandise,
(3.) *Which should have been invoiced,*
(4.) And as to which the invoice is omitted,
(5.) Goods, etc., subject to duty,
(6.) The duty not being paid,
(7.) Done knowingly and willfully,
(8.) All with intent to defraud the revenue of the United States.

In *United States vs. Nolton* (1867), 5 Blatchford, 427, the defendant was indicted for smuggling goods from Canada into the United States in violation of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. This section then, as now, made it a crime *to smuggle goods "which should have been invoiced."* As section one (1) of the Act of March 2, 1821 (3 Stat., 616), did *not* require "*an invoice*" when goods were brought into the United States from an adjoining country (Canada), *Mr. Circuit Justice Nelson* quashed the indictment, and held that there could be no violation of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat.

(*b.*) *When an invoice is required.*

Section 4 of the Act of June 10, 1890 (26 Stat., 131), to simplify the laws in relation to the collection of the revenues, provides, among other things, as follows, to wit:

"SEC. 4. That, *except in case of personal effects accompanying the passenger*, no importation of any merchandise exceeding $100.00 in dutiable value shall be admitted to entry without the production of a duly certified invoice thereof as required by law, or of an affidavit made by the owner, importer, or consignee before the collector or his deputy, showing why it is impracticable to produce such invoice."

The words, "*except in case of personal effects accompanying the passenger*," divided goods to be brought into the United States into two classes:

FIRST.—Goods which must be invoiced, and as to which it is possible to violate Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., and be guilty of smuggling;

SECOND.—Goods which need not be invoiced, and as to which it is impossible to violate Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., and as to which one cannot be guilty of smuggling.

The word, "*effects*," means goods, movables, or personal estate; the word, "*personal*," means pertaining to a person, movables, chattels; the words, "*personal effects*," mean movables, or chattels; the word, "*accompanying*," means going with; the word, "*passenger*," means one who is making a passage. In the case at bar, the diamonds were personal effects; the diamonds accompanied Captain Loesewitz; and Captain Loesewitz was a passenger. Therefore, there being no legal obligation to have an invoice, there could be no violation of Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. *United States vs. Nolton* (1867), 5 Blatchford, 427. If it be said that Frank Loesewitz was Captain of the steamer Rhynland, and, therefore, does not

come within the language of this section, that argument fails, because he did not cease to be a passenger by being a Captain. To construe the word, "passenger," to exclude a person, who, being not only a passenger, but something else, to wit, a Captain, would lead to absurd consequences, because such construction would require a Captain, who is as well a passenger, to invoice personal effects, which, when accompanying any other passenger, it would not be necessary to invoice.

It, therefore, follows that one element of the crime of smuggling, for which a punishment is prescribed by Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., does not exist. *United States vs. Nolton* (1867), 5 Blatchford, 427.

(*c.*) *Assignments of Error.*

It, therefore, follows that assignment of error number ten (*ante*, pp. 39–40) is well taken, because the Court refused to instruct the jury to find a verdict of not guilty.

It also follows that assignment of error number twelve (*ante*, p. 40) is well taken, because the Court refused to instruct the jury to find a verdict of not guilty on the second count of the indictment which charged smuggling.

It also follows that assignment of error number seventeen (*ante*, p. 40) is well taken, because the Court instructed the jury to find the defendant guilty if they believed "the statements made here under oath by Captain Loesewitz."

It also follows that assignment of error number sixteen (*ante*, pp. 40–41) is well taken, because the Court instructed the jury to find the defendant guilty if they believed defendant guilty "of the smuggling charged as testified to by Captain Loesewitz."

It also follows that assignment of error number thirteen (*ante*, p. 41) is well taken, because the Court refused to give special instruction, number five (5).

VII.

Errors in Rulings as to the Corpus Delicti.

(1.) Without proof of the *corpus delicti* there can be no conviction in a criminal case; if the *corpus delicti* fail of identification, there can be no conviction in a criminal case.—*Post p. 76.*

(2.) Where a captain testified that he was given a package, the property of a stranger in Antwerp, and that he wrote thereon an address, and the package seized had no address thereon; and that he had been in the habit of bringing over small packages: and that he did, and that he did not, know the consignee; it is error for the Court to instruct the jury that they must find the defendant (who was the stranger referred to) guilty if they believe the *testimony* of the captain to be true.—*Post pp. 76-79.*

(*a.*) *The corpus delicti.*

Without proof of the *corpus delicti* there can be no conviction in a criminal case; if the *corpus delicti* fails of identification, there can be no conviction in a criminal case. Wharton, Criminal Evidence (9th Ed.), Sec. 325.

(*b.*) *The facts and the evidence.*

Captain Loesewitz testified as heretofore set out (*ante* pp. 16–17), and also testified (record, p. 34):

Q. "Where did you put the package—in your pocket loose?"
A. "I put it loose in my pocket."
Q. "Where did you put the paper?"
A. "Along with it—along with the box."
Q. "Loose?"
A. "Along with the box."

Q. "You never tied the paper to it?"
A. "No, sir."

* * * * * * * * * *

Q. "You put that address loose in your pocket, without attaching it to the package in any way?"
A. "Yes, sir."
Q. "When you got aboard the ship, where did you put the package?"
A. "In the drawer."
Q. "Where did you put the paper?"
A. "Afterwards I put it in a little case."
Q. "In a pocket-book or something of that kind?"
A. "Yes, sir; in a pocket-book."

By the Court:

Q. "Why did you not put the paper containing the address on the package—fasten it there? Why did you keep them separately?"
A. "I kept that, and put it afterwards with the package *in another paper, and wrote the address on myself.*"

Revenue Officer Gallen, who seized the package, testified (record p. 44) as follows:

Q. "Look at that box, and tell me whether that is the box?"
A. "Yes, sir; that is the box which I seized."
Q. "Was the box in that condition, with the exception of the tearing of the paper?"
A. "With the exception of the tearing of the paper. That paper was around the box, and then there was another seal right in the corner."
Q. "It was torn off in the tearing of the paper?"
A. "Yes, sir."
Q. "Was there any address whatever upon the box?"
A. "*No address on the box whatever.*"

Captain Loesewitz testified (record, p. 31) that he had with him the business card of jeweler Hendrickson, of Newark, New Jersey, which he gave to Van Hammelrick (record, p. 33); that he did and that he did not (record, p. 39) know that Van Reeth had come to Cincinnati in 1895, with a great number of others, to start a diamond-cutting establishment. He did not produce the piece of paper with the name

Van Reeth thereon just after his arrest, or when he claimed, he told all to the custom-house officer; he did not produce it at his own examination, and produced it for the first time March 18, months thereafter, at the hearing of Mr. Keck before United States Commissioner Bell (record, p. 52).

The package, therefore, seized by Revenue Officer Gallen is not positively identified as the package which Loesewitz claims was given him by Van Hammelrick, January 27, 1896, in the Café Alsacienne, on the Place Verte, in Antwerp, Belgium.

(*c.*) *The rulings of the Court and the assignments of error.*

The Court charged the jury, among other things (p. 112) as follows:

"It is sufficient to say in this respect that, *if the statements made here under oath, by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here, are true*, the defendant is guilty of the offense charged."

An exception was noted (record, p. 113), and is assigned for error as number seventeen (record, p. 118).

Under this charge of the Court to the jury the inquiry becomes pertinent, *Which testimony?* The testimony of Captain Loesewitz was inconsistent with itself in important particulars. One story might be consistent with the theory of turpitude and the other with innocence. By the charge of Court it would then become immaterial which of the stories the jury should believe, either the one involving turpitude or the one consistent with innocence, because in either case the jury was bound to find the defendant guilty. Captain Loesewitz swore positively that he had been in the habit of bringing over similar small packages in the same way that he brought over the package seized by Revenue Officer Gallen; and that, after the vessel had been docked, he would go to a custom officer on the dock and report the fact; but that in

this case he had no time to go on the dock, as the Treasury Agents came aboard before he had an opportunity to go upon the dock (record, pp. 35–37; *ante*, pp. 63–65). He further positively testified, as above quoted, that the package claimed to have been given to him by Mr. Van Hammelrick, in Antwerp, had upon it an address which he wrote thereon himself. The package seized by the revenue officer had no address upon it, as testified to by Loesewitz and as testified to by Revenue Officer Gallen, as above quoted.

It is a reasonable hypothesis that the package seized by Revenue Officer Gallen was one of the packages, Captain Loesewitz testified, he had been in the habit of bringing over (record, pp. 36–37; *ante*, pp. 63–65).

The only mark of identification known to Captain Loesewitz was the address written by himself. No such box was seized; and it was at least a question for the jury to say whether the box on which he claimed to have put an address was the box which was seized, and upon which there was no address.

The plaintiff in error, Mr. Herman Keck, was presumed to be innocent until proven to be guilty beyond a reasonable doubt, and he was entitled to the benefit of any reasonable doubt arising from *all* the evidence. If there were any reasonable hypothesis consistent with his innocence or inconsistent with his guilt, he should have been acquitted. The Captain testified to better his own chances to get off (record, p. 42), and the case turned on the claimed ability of the witness, Captain Frank Loesewitz, to identify Mr. Herman Keck, a stranger whose name he did not know, whom he had seen for less than half an hour, during which a conversation was carried on in Flemish between Captain Loesewitz and Mr. Van Hammelrick. The charge of the Court violated all rules governing charges to juries. (See Revised Brief, p. 126–130.)

VIII.

Errors Summarized.

We will now briefly summarize first (1) the assignments of error heretofore discussed bearing on the question ordered to be re-argued by the Court (*ante* p. 1); and second (2), the assignments of error discussed in our former briefs.

(*1.*) *Assignments of error discussed in this brief.*

The five assignments of error discussed in this brief are as follows, to wit:

Tenth.— This ruling of the Court is set out *ante* p. 20; pp. 39–40. That this assignment of error should be sustained see *ante* p. 27; p. 50; p. 62; p. 75.

Twelfth. — This ruling is set out *ante* p. 20; p. 40. That this assignment of error should be sustained see *ante* p. 27; p. 50; p. 62; p. 75.

Thirteenth.— This ruling of the Court is set out *ante* p. 41. That this assignment of error should be sustained see *ante* pp. 66–67; p. 75.

Sixteenth.— This ruling is set out *ante* p. 21; p. 40. That this assignment of error should be sustained see *ante* p. 28; p. 51; p. 67; p. 75.

Seventeenth.— This ruling is set out *ante* pp. 20–21; pp. 40–41. That this assignment of error should be sustained see *ante* pp. 27–28; p. 51; p. 67; p. 75; p. 78.

(*2.*) *Assignments of error discussed in our former briefs.*

(*a.*) The first count of the indictment is fatally defective, and the demurrer thereto ought to have been sustained.

Revised Brief, pp. 23–26; *Brief in Reply*, pp. 1–12; *Ledbetter vs. United States* (1898), 170 U. S., 606, 610, 611, 614.

(*b.*) The second count of the indictment is fatally defective, and the demurrer thereto ought to have been sustained. Revised Brief, pp. 26–59; *Ledbetter vs. United States* (1898), 170 U. S., 606, 610, 611, 614.

(*c*) The second count of the indictment covered the crime of smuggling. Order for re-argument (*ante*, p. 1); Revised Brief, pp. 72–75; *United States vs. Sixty-seven Packages of Dry-goods* (1854), 17 Howard, 85, *Mr. Justice Nelson* at p. 93; *ante*, p. 7. The evidence makes out no crime. Revised Brief, pp. 73–75.

(*d.*) Evidence erroneously admitted. Revised Brief, pp. 91–106.

(*e.*) Evidence erroneously excluded. Revised Brief, pp. 106–123.

(*f.*) Manner of charging jury. Revised Brief, pp. 124–133.

(*g.*) Manner of answering request for special instruction. Revised Brief, pp. 134–136.

(*h.*) Error for refusing *dedimus*. Revised Brief, pp. 136–147.

(*i.*) Sentence erroneous. Revised Brief, pp. 147–149; *Reynolds vs. United States* (1878), 98 U. S., 145, 168–169 *note*.

In Conclusion.

Apparently in this case some doubt has existed in the mind of this Court as to the correct interpretation of a criminal statute. That it is better for ten guilty to escape than one

innocent suffer; that no one shall be deprived of his liberty without the judgment of his peers; that a verdict taking away the good name of a citizen shall be by the unanimous vote of twelve jurors; that an accused is presumed to be innocent until proved by the testimony of witnesses (who must meet him face to face), beyond a reasonable doubt, to be guilty; that the evidence must be consistent with every reasonable hypothesis of guilt and inconsistent with any reasonable hypothesis of innocence before a verdict of guilty can be returned; that criminal statutes must be strictly construed; and, that every reasonable doubt shall be resolved in favor of the accused, are rules as old as the law itself. If there be still a doubt in the mind of the Court as to the correct interpretation of the word smuggle that doubt should be resolved in favor of Mr. Herman Keck, plaintiff in error. *Baron Huddleston* well said in *Rumball vs. Schmidt* (1828), 8 Queen's Bench Division (L. R.), 603, 608, that where a "section [of a statute] imposes a penalty for a criminal offense, the appellant is entitled to the benefit of any doubt which may arise on the construction of it." In *Rex vs. Bond* (1818), 1 Barnewall & Alderson, 390, 392–393, *Lord Justice Abbott* said "it would be extremely wrong that a man should by a long train of conclusions be reasoned into a penalty, when the express words of the act of Parliament do not authorize it."

The arguments of the learned Assistant Attorneys-General in favor of constructive crimes is fully answered in the numerous cases heretofore referred to (*ante*, pp. 21–25; pp. 29–33), and no more strongly than in *France vs. United States* (1897), 164 U. S., 676, 683, where *Mr. Justice Peckham* said, "If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation." We know but one rule for the guidance of the bench and bar, as stated by *Sir Frederick Pollock*, "justice according to law"

(Pollock's Jurisprudence (1896) 28–54). If an amendment be thought wise in the law, an appeal may be had to the commission appointed under the Act of June 4, 1897 (30 Stat., 11, 58), and the Act of July 1, 1898 (30 Stat., 597, 643), to co-operate with the Attorney-General, in a revision of the penal laws of the United States.

We respectfully submit that the conviction should be set aside and the plaintiff in error discharged.

Respectfully submitted,

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CINCINNATI, October 8, 1898.